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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 475

GERHARD TERLINDEN, APPELLANT,

vs.

JOHN C. AMES, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 25, 1901.

(18,328.)

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1&2 And afterwards, to wit: on the 14th day of November, A. D. 1901, there was filed in the clerk's office of said court, a præcipe in said cause, which said præcipe is in the words and figures following, to wit:

In the District Court of the United States, Northern District of Illinois.

In re GERHARD TERLINDEN. *Habeas Corpus.*

To the clerk U. S. district court:

Kindly prepare authenticated transcript in the above-entitled cause, consisting of:

(1.) Petition for writ of *habeas corpus.*
(2.) Writ of *habeas corpus.*
(3.) Return of marshal.
(4.) Traverse.
(5.) Petition for certiorari.
(6.) Prayer for appeal to circuit court of appeals.
(7.) Assignment of errors.
(8.) Citation.
(9.) Appeal bond.
(10.) Orders of court, Oct. 17, 1901, October 21st, 1901, Oct. 29, 1901, Oct. 29, 1901 2 o'clock, Oct. 31st, 1901, Nov. 5th, 1901, Nov. 6th, 1901.
(11.) Prayer for appeal and assignment of errors to Supreme Court.
(12.) Bond.
(13.) Citation.
(14.) Order of Nov. 15th, 1901.

3 And afterwards, to wit, on the 28th day of October, A. D. 1901, there was filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, a Petition for a Writ of Habeas Corbus; said Petition being in the words and figures following, to wit: Petition, filed 28, 1901

4 United States of America,
Northern District of Illinois. }

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois.

In re
Habeas Corpus,
Gerhard Terlinden. }

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States for the Northern District of Illinois:

The petition of Gerhard Terlinden respectfully shows:

First. That he is now imprisoned and restrained of his liberty by John C. Ames, Marshal of the United States for the Northern District of Illinois, at the Cook County jail in the City of Chicago, Illinois.

Second. That your petitioner is thus imprisoned and held in custody under color of the authority of the Constitution and laws of the United States, relating to the return of fugitives from justice to foreign countries with which the United States has concluded treaties of extradition.

Third. That said John C. Ames claims to hold in custody and imprison your petitioner under and by virtue of a certain warrant issued by Mark A. Foote, United States Commissioner, which warrant was issued under the following circumstances, as your petitioner is informed and verily believes: On or about the 15th day of August, 1901, the complaint of Walther Wever, Imperial German Consul

5 at Chicago, a copy of which complaint is hereto annexed, marked Exhibit "A," was presented to said Commissioner; thereafter, a warrant, a copy whereof is hereto annexed, marked Exhibit "B," was issued and upon this warrant your petitioner was apprehended at the City of Milwaukee, Wisconsin, on or about the 16th day of August, 1901, and brought before said Commissioner to be dealt with according to law; that the proceedings before said Commissioner at the instance and request of the attorney for said Imperial German Consul, were continued to the 6th day of September, 1901, and on said day, at the instance and request of said attorney, to the 26th day of September, 1901; that on said last mentioned day, the proceeedings

filed Oct. 1901.

heretofore had before said Commissioner, were dismissed upon the motion of the attorney for the German Consul; your petitioner while still in the presence of said Court, was again arrested on said 26th day of September, 1901, upon a warrant, a copy of which is hereto annexed, marked Exhibit "C," issued upon a complaint, a copy of which is hereto annexed and marked Exhibit "D," presented to said Commissioner by said Imperial German Consul on or about the 25th day of September, 1901.

Fourth. That said imprisonment is illegal and without authority in law and in violation of the Constitution and laws of the United States for the following reasons:

1. No treaty or convention for the extradition of fugitives from justice, exists between the United States and the German Empire.

2. That the treaty or convention for the extradition of fugitives from justice concluded between the United States and the Kingdom of Prussia on the 16th day of June, 1852, and ratified May 3rd, A. D. 1853, was terminated by the creation of the German Empire and the adoption of the Constitution of said Empire in A. D. 1871 and that no treaty or convention for the extradition of fugitives from justice has been concluded between the United States on the one part, and the Kingdom of Prussia or the German Empire on the other, since said time.

3. Said complaint does not charge an extraditable offense under the provisions of the treaty of 1852, concluded between the United States and Prussia and other German States, were said treaty still in force and of binding effect.

4. Your petitioner is not guilty of any extraditable offense under the provisions of said treaty of 1852, were said treaty still in force and of binding effect.

5. All proceedings had or attempted to be had before said Commissioner under said complaint and warrant are illegal, void and without authority in law because said Commissioner did not have jurisdiction over the person of this petitioner.

Wherefore your petitioner prays that a writ of Habeas Corpus may issue out of the District Court of the United States for the Northern District of Illinois directed to the said John C. Ames, commanding him to produce the body of your petitioner before said Court, at some convenient time to be herein designated, there to abide what shall be awarded by the Court in the premises, and that your petitioner be discharged from said imprisonment.

GERHARD TERLINDEN,
Petitioner.

ALBERT W. MAY, Chicago.
A. C. UMBREIT, Milwaukee.
Attorneys.

7 United States of America, }
Northern District of Illinois. }

State of Illinois, }
County of Cook. } ss.

Before me Will T. Davies a Notary Public in and for the County of Cook, State of Illinois, U. S. A. this day personally appeared the petitioner, Gerhard, Terlinden, and he, by me first duly sworn deposes and says that he has read the above petition by him subscribed and knows the contents thereof, and that the same is true.

GERHARD TERLINDEN.

Subscribed and sworn to before me, this 12th day of October, A. D. 1901.

WILL T. DAVIES,
Notary Public.

[SEAL]

8 EXHIBIT A.

Exhibit A t
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United States of America, }
Northern District of Illinois. } ss.

To the Honorable Mark A. Foote, Commissioner of the Untited States in and for the Nothern District of Illinois, and one of the Commissioners specially authorized to issue warrants for the apprehension of fugitives from justice of foreign governments.

The undersigned, Dr. Walther Wever, Imperial German Consul at Chicago, respectfully represents and shows upon this oath that he is the duly accredited official agent and representative of the German Empire at Chicago and also the Kingdom of Prussia, forming a part of said German Empire; that one Gerhard Terlinden, alias Theodor Graefe, late of the City of Duisburg, in the Kingdom of Prussia, German Empire, and a subject of said Kingdom of Prussia, did, to-wit, in the first six months of the year 1901, commit within the jurisdiction of the said Kingdom of Prussia, various crimes of forgery and counterfeiting and the utterance of forged papers, as follows, to-wit:

That the said Gerhard Terlinden, alias Theodor Graefe, being a Director of the "Aktien Gesellschaft Gerhard Terlinden" a corporation duly organized and incorporated under the laws of the Kingdom of Prussia, did, on to-wit, the first day of April, 1901, and at divers other times since said date, at, to-wit the city of Duisburg, in said Kingdom of Prussia, forge and counterfeit certain certificates of stock of the said "Aktein Gesellschaft Gerhard Terlinden" and put off,

A to petition, complaint.

uttered and disposed the same with felonious intent to cheat and defraud one Robert Suermont of the City of Aachen in the Kingdom of Prussia, Amsterdamsche Bank, a corporation doing business in the Kingdom of the Netherlands, Discontogesellschaft, a corporation doing business in Berlin in the Kingdom of Prussia, and the various other persons and corporations in said Kingdom of Prussia, out of large sums of money amounting in the aggregate to about one million and a half of Marks, German coin, being about Three hundred and seventy 9 thousaind Dollars American money, and by means of said forgeries and counterfeiting and the felonious utterance of said forged and counterfeited certificates of stoc , the said Gerhard Terlinden, alias Theodor Grae fe, actually did cheat and defraud the said several persons and corporation out of said sums of money, contrary to the laws of the said Kingdom of Prussia.

And the complainant further says that the said Grehard Terlinden, alias Theodor Graefe, was at the time of committing the said forgeries and counterfeiting and the utterance of said forged and counterfeited certificates of stock a resident of said city of Duisburg and a citizen of the said Kingdom of Prussia, and that the said Gerhard Terlinden, alias Theodor Graefe, is now a fugitive from the said Kingdom of Prussia; that on or about the first day of July, 1901, he fled into the jurisdiction of the United States of America for the purpose of seeking an asylum therein, that he is now said to be concealed within the Northern District of Illinois or in the Eastern District of Wisconsin and that the crimes with which the said Gerhard Terlinden, alias Theodor Graefe, is charged, are crimes embraced within the treaty of extradition between the United States of America and the Kingdom of Prussia concluded on the 16th day of June, 1852 and ratified May 3rd, 1853.

The undersigned therefore prays that a warrant be issued for the apprehension and commitment of the said Gerhard Terlinden alias Theodor Graefe, in order that the evidence of his criminality may be inquired into, and the said Grehard Terlinden, alias Theodor Graefe, may be extradited and delivered up to the justice of the said Kingdom of Prussia, in accordance with the stipulations of said treaty and the Acts of Congress passed in pursuance thereof.

.....

(Verification)

Exhibit B—Warrant.

EXHIBIT "B."

10

United States of America, } ss.
Northern District of Illinois. }

The President of the United States of America to the Marshals of the United States for any district respectively, and to their Deputies, or the Deputies of any of them, or to any of said Deputies, Greeting:

Whereas, complaint has been made on the oath of Dr. Walther Wever, Imperial German Consul at Chicago and for the Consulat District comprising said Northern District of Illinois, before Mark A. Foote, a commissioner specially appointed and authorized by the District Court of the United States for the Northern District of Illinois, to execute the Act of Congress entitled "an act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivering up of certain offenders" approved August 12, 1848, and the act entitled "an act to amend the act entitled "an act for the giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivering up of certain offenders," approved June 22nd, 1860, that one Gerhard Terlinden alias Theodor Grafe, did on various days in the year nineteen hundred and one, A. D. within the jurisdiction and government of the Kingdom of Prussia, commit the crimes of Forgery and Counterfeiting and the Utterance of Forged Certificates of Stock.

And whereas it is also shown in and by said complaint that the said Gerhard Terlinden alias Theodor Graefe was at the time of committing said crimes of Forgery and Counterfeiting and the Utterance of Forged Certificates of Stock, a resident and a subject of the Kingdom of Prussia, and that he is a fugitive from justice of the Kingdom of Prussia; that, on or about the first day of July nineteen hundred and one, he fled into the jurisdiction of the United States of America, for the purpose of seeking an asylum therein, and that the said crimes with which the said Gerhard Terlinden, alias Theodor
11 Graefe, is charged, are embraced in the Treaty of Extradition between the United States of America and the Kingdom of Prussia concluded on the 16th day of June, 1852 and ratified May 3rd, 1853.

These are therefore to command you, and each of you, forthwith to apprehend the said Gerhard Terlinden, alias Theodor Graefe, and to bring him before the said Mark A. Foote, Commissioner aforesaid, or before another other commissioner of the United States of America duly authorized as aforesaid, or before any justice of the Supreme

Court, Circuit Judge or District Judge of the United States of America, to answer the premises, and further to be dealt with according to law and the provisions of said treaty.

In witness whereof, I have hereunto set my hand as such commissioner, at my office in said district, this 15th day of August, nineteen hundred and one.

.....

Commissioner.

Exhibit D—Complaint, dated Aug. 25, 1901.

12

EXHIBIT "D."

UNITED STATES OF AMERICA,

Northern District of Illinois.

To the Hon. Mark A. Foote, Commissioner of the United States of America, and for the Northern Disrtict of Illinois, and one of the Commissioners specially authorized by order of the District Court of the United States of America in and for the Northern District of Illinois to issue warrants for the apprehension of fugitives from justice of foreign governments.

The undersigned, Dr. Walther Wever, Imperial German Consul at Chicago, respectfully represents and shows upon his oath, that he is the duly accredited official agent and representative of the German Empire at Chicago and also of the Kingdom of Prussia, forming part of said German Empire; and that as such German Consul and representative of the Kingdom of Prussia he complains that one Gerhard Terlinden, alias Theodor Graefe, late of the City of Oberhausen, in the Kingdom of Prussia, German Empire, and a subject of said Kingdom of Prussia, German Empire, did, to-wit, at the time and times hereinafter set forth, within the jurisdiction of said Kingdom, commit various crimes of forgery and counterfeiting and the utterance of forged instruments, that is to say:

This complainant represents and shows that, to-wit, in the month of September, A. D. 1900, the said Gerhard Terlinden, alias Theodor Grafe, being at said time and subsequent thereto a director of the Gerhard Terlinden Stock Company, doing businesss in the City of Oberhausen in the Kingdom of Prussia, placed into circulation, uttered and pledged with the Hannoverian Bank of Hanover within the jurisdiction of the Kingdom of Prussia, four hundred certain genuine stock certificates of the said Gerhard Terlinden Stock Company, said stock certificate being of the face value of 1000 Marks (German coin) each and being numbered consecutively from 2901 to 3300 both inclusive, which said stock certificates were dated in August

Exhibit D—Complaint, dated Sept. 25, 1901

1900, and certified that the holder of each one of said certificates
13 was interested to the amount of 1000 marks as shareholder in said Gerhard Terlinden Stock Company, and which said stocks certificates were private instruments of pecuniary value.

And the undersigned complains that thereafter, towit—in the month of March, 1901, at the City of Oberhausen within the jurisdiction of the Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, did, feloniously and contrary to the laws of the said Kngdom of Prussia, falsely make, forge and counterfeit four hundred certain instruments purporting to be genuine certificates of stock of the Gerhard Terlinden Stock Company, each of the face value of 1000 Marks German coin and purporting to certify that the holder thereof was interested in the said Gerhard Terlinden Stock Company as a shareholder to the amount of 1000 Marks, which said instruments were also numbered consecutively from 2901 to 3300 both inclusive and were made to appear to be the actual original genuine stock certificates of said stock company theretofore uttered by the said Gerhard Terlinden, alias Theodor Grafe, to the Hannoverian Bank as aforesaid with intent to cheat and defraud the Disconto Gesellschaft, a banking house doing business at Berlin in the said Kingdom of Prussia, and other persons.

And the undersigned complains that also, to-wit, in the month of March, 1901, at the City of Oberhausen within the jurisdiction of the Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, did, feloniously and contrary to the laws of the said Kingdom of Prussia, cause to be falsely made forged and counterfeited four hundred certain instruments purporting to be genuine certificates of stock of the Gerhard Terlinden Stock Company, each of the face value of 1000 Marks German coin and purporting to certify that the holder thereof was interested in the said Gerhard Terlinden Stock Company as a shareholder to the amount of 1000 Marks, which said instruments were numbered consecutively from 2901 to 3300 both inclusive, and were made to appear to be the actual original genuine stock certificates theretofore uttered by the said Gerhard Terlin-
14 den, alias Theodor Grafe, to the Hannoverian Bank as aforesaid, with intent to cheat and defraud to Di-conto Ge-ellschaft, a banking house doing business at the City of Berlin in the said Kingdom of Prussia, and other persons.

And the undersigned further complains that also, to-wit in the month of May, 1901, at Oberhausen, in the Kingdom of Prussia the said Gerhard Terlinden, alias Theodor Grafe, within the jurisdiction of the Kingdom of Prussia, being then and there possessed of certain four hundred forged, counterfeited and simulated certificates of stock of the Gerhard Terlinden Stock Company doing business at the City

Ex. D—Complaint of Sept. 1901.

of Oberhausen, in the Kingdom of Prussia, which said forged counterfeited and simulated certificates of stock were numbered respectively and consecutively from 2901 to 3300, both inclusive, and each and all of which purported on their face to entitle the holder thereof to an interest of 1000 Marks as shareholder to the said Gerhard Stock Company, did then and there pass utter and put off said forged, counterfeited and simulated certificates of stock to the Discontogesellschaft, a banking houes of Berlin within the jurisdiction of the Kingdom of Prussia, with intent to prejudice, damage and defraud said Discontogesellschaft, well knowing said certificates of stock to be false, forged counterfeited and simulated, contrary to the laws of the Kingdom of Prussia.

And the undersigned further complains that also, to-wit in the month of May, A. D. 1901, at Oberhausen in the Kingdom of Prussia, the said Gerhard Terlinden, aliass Theodor Grafe, within the jurisdiction of the Kingdom of Prussia, being then and there possessed of one hundred and thirty three certain forged, counterfeited and simulated certificates of stock of the Gerhard Terlinden Stock Company doing business at the City of Oberhausen in the Kingdom of Prussia, which said forged, counterfeited and simulated certificates of stock were numbered respectively and consecutively from 1803 to 1935 both inclusive, and each and all of which purported on their face to entitle the holder thereof to an interest of 1000 Marks as shareholder in the said Gerhard Terlinden Stock Company, did then and there pass, utter and put off said forged, counterfeited and simulated certificates of stock, well knowing them to be forged, counterfeited and simulated, to the Amsterdamsche Bank, a banking house doing business in the Kingdom of the Netherlands, with intent to prejudice, damage and defraud the said Amsterdamsche Bank, and others, contrary to the laws of the Kingdom of Prussia.

And the undersigned further complains that also, to-wit in the month of March of the year A. D. 1901, at Oberhausen, within the jurisdiction of the Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, did feloniously forge, falsely make and counterfeit a certain steel stamp so as to cause the imprint made with the same to resemble and appear to be the imprint made by a certain stamp of the Royal Prussian Revenue Office at the City of Duisburg within the Kingdom of Prussia, which said stamp was known as and marked No. 38 and was used by said Royal Prussian Revenue Office to imprint upon stock certificates issued by stock companies, and on other instruments, an impression of said stamp in order to show that a certain stamp duty imposed by the laws of said Empire of Germany had been duly paid upon such certificates of stock or other instruments; and the said Gerhard Terlinden did then and there falsely make, forge and counter-

Exhibit D—Complaint of Sept. 25, 1901.

feit said stamp numbered 38 of the said Royal Prussian Revenue Office at Duisburg aforesaid, with intent to cheat and defraud the said Government of the German Empire, and others, contrary to the laws of the said Kingdom of Prussia.

And the undersigned further complains that also, to-wit, in the month of March in the year 1901, at, to-wit, Oberhausen, in the the Kingdom of Prussia, and within the jurisdiction of the
16 said Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, did feloniously cause to be forged, falsely made and counterfeited a certain steel stamp so as to cause to imprint made with the same to resemble and appear to be the imprint made by a certain stamp of the Royal Prussian Revenue Office at the City of Duisburg within the said Kingdom of Prussia, which said stamp was known as and marked No. 38 and was used by the said Royal Prussian Revenue Office at the City of Druisburg, to imprint upon stock certificates issued by stock companies, and on other instruments, an impression of said stamp in order to show that a certain stamp duty imposed by said Empire of Germany had been duly paid upon such certificates of stock or other instruments; and the said Gerhard Terlinden did then and there cause to be falsely made, forged and counterfeited said stamp numbered 38 of said Royal Prussian Revenue Office at Druisburg aforesaid, with intent to cheat and defraud the said Government of the Empire of Germany, and others contrary to the laws of the said Kingdom of Prussia.

And the undersigned further complains that also, to-wit in the in the month of March, April and May of the year A. D. 1901, at, to-wit, the City of Oberhausen within the jurisdiction of the said Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, being then and there possessed of a large number, to-wit 400 certain instruments purporting to be certificates of stock of the Gerhard Terlinden Stock Company, of Oberhausen, in the Kingdom of Prussia, numbered consecutively from 2901 to 3300 both inclusively, and also of 133 other certain instruments purporting to be certificates of stock of the Gerhard Terlinden Stock Company of said Oberhausen, numbered consecutively 1803 to 1935, both inclusive, all of said instruments being dated in August, 1901, and each purporting to certify that the holder thereof was interested to the amount of 100 Marks, German coin, as shareholder in the Gerhard Terlinden Stock Company,
17 aforesaid, and the said Gerhard Terlinden, alias Theodor Grafe, did, to-wit, in the months of March, April and May, in the year A D. 1901, at Oberhausen, aforesaid, for the purpose of making it falsely appear that the stamp duty imposed by the laws of the German Empire upon stock issues of that character, had been duly paid, imprint upon said instruments purporting to be stock certificates of the Ger-

ibit D—Com-
laint of Sept.
, 1901.

hard Terlinden Stock Company in ink or color, the impression of said forged and counterfeited stamp so as aforesaid made or caused to be made by him, with intent to cheat and defraud the Government of the said Empire of Germany and others.

And the undersigned further complains that also, to-wit, in the months of March, April and May of the year A. D. 1901, at, to-wit, the City of Oberhausen within the jurisdiction of the said Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, being then and there possessed of a large number, to-wit, 400 certain instruments purporting to be certificates of stock of the Gerhard Terlinden Stock Company, of Oberhausen, in the Kingdom of Prussia, numbered consecutively from 2901 to 3300 both inclusive, and also of 133 other certain instruments purporting to be certificates of stock of the Gerhard Terlinden Stock Company of said Oberhausen, numbered consecutively 1803 to 1935, both inclusive, all of said instruments being dated in August, 1901, and each purporting to certify that the holder thereof was interested to the amount of one thousand Marks (German coin) as shareholder in the Gerhard Terlinden Stock Company, aforesaid, and being also possessed of a certain false and counterfeited stamp so as, aforesaid made or caused to be made by him, the said Gerhard Terlinden, alias Theodor Grafe, did, to-wit, in the months of March, April and May of the year A. D. 1901, at Oberhausen aforesaid, for the purpose of making it falsely appear that the stamp duty imposed by the laws of the German Empire upon stock issues of that character, had been duly paid, cause to be imprinted upon each of said instruments
18 purporting to be stock certificates of the Gerhard Terlinden Stock Company in ink or color the impression of the said forged or counterfeited stamp, with intent to cheat and defraud the Government of the said Empire of Germany and others.

And the undersigned further complains, that also, to-wit, in the months of March, April and May of the year 1901, at, to-wit, the City of Oberhausen within the jurisdiction of the said Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, being then and there possessed of a large number, to-wit, 400 certain instruments purporting to be stock certificates of the Gerhard Terlinden Stock Company of Oberhausen in the Kingdom of Prussia, numbered consecutively from 2901 to 3300, both inclusive, and also of 133 other certain instruments purporting to be certificates of stock of the Gerhard Terlinden Stock Company of said Oberhausen, numbered consecutively from 1803 to 1935, both inclusive, all of said instruments being dated in August, 1901, and each of said instruments purporting that the holder thereof was interested to the amount of one thousand Marks (German Coin) as shareholder in the Gerhard Terlinden Stock Company, aforesaid, and being also possessed of a certain forged and

Exhibit D—Complaint of Sept. 25, 1901.

counterfeit stamp made to appear to be the stamp No. 38 of the Royal Prussian Revenue Office at Duisburg, the said Gerhard Terlinden, alias Theodor Grafe did, to-wit, in the months of March, April and May, 1901, at to-wit, Oberhausen aforesaid, imprint upon each of said instruments in ink or color, the impression of said forged or counterfeited stamp so as aforesaid made or caused to be made by him, for the purpose of making the said several instruments appear to be genuine stock certificates of the Gerhard Terlinden Stock Company upon which the stamp duty imposed by said laws of the German Empire had been duly paid and of passing, uttering and putting into circulation, the said forged and counterfeited certificates of stock with intent to prejudice, damage and defraud the Discontogesell-
19 schlaft of Berlin in said Kingdom of Prussia, and other firms, persons and corporations.

And the undersigned also complains that also to-wit, in the months of March, April and May of the year A. D. 1901, at, to-wit, the City of Oberhausen within the jurisdiction of the said Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe being then and there possessed of a large number, to-wit, 400 certain instruments purporting to be certificates of stock of the Gerhard Terlinden Stock Company, of Oberhausen in the Kingdom of Prussia, numbered consecutively from 2901 to 3300, both inclusive, and also of 133 other certain instruments purporting to be certificates of stock of the Gerhard Terlinden Stock Company of Oberhausen aforesaid, numbered consecutively from 1803 to 1935, both inclusive, all of said instruments being dated in August, 1901, and each purporting to certify that the holder thereof was interested to the amount of one thousand marks (German coin) as shareholder in the Gerhard Terlinden Stock Company, aforesaid, and being also possessed of a certain forged and counterfeited stamp made to appear to be the stamp numbered 38 of the Royal Prussian Revenue Office of Duisburg, the said Gerhard Terlinden, alias Theodor Grafe, did then and there, to-wit, in the months of March, April and May of the year 1901, at, to-wit, Oberhausen aforesaid, cause to be imprinted upon each of said instruments, in ink or color, the impression of said forged and counterfeited stamp, well knowing the same to be forged, for the purpose of making the said several instruments to appear to be genuine stock certificates of the Gerhard Terlinden Stock Company, upon which the stamp duty imposed by the laws of the German Empire, had been duly paid, and passing, uttering and putting into circulation the said forged and counterfeited certificates of stock with intent to prejudice, damage and defraud the Discontogesellschaft of Berlin in said Kingdom of Prussia, and other firms, persons, and corporations, con-
20 trary to the laws of the Kingdom of Prussia.

Exhibit D—Complaint of Sept. 1901.

And the undersigned further complains, that also, to-wit in the month of May, 1901, the said Gerhard Terlinden, alias Theodor Grafe, at, to-wit, the City of Oberhausen, in the Kingdom of Prussia, and within the jurisdiction of the Kingdom of Prussia, was possessed of 400 certain forged and counterfeited certificates of stock, numbered consecutively from 2901 to 3300, both inclusive and bearing upon their face the imprint of a certain forged and counterfeited stamp made to appear to be the stamp of the Imperial German Revenue Office at Duisburg, and knowing that said certificates to be false and counterfeited, did then and there pass, utter put off and dispose of said certificates to the Discontogesellschaft, a banking house doing business at Berlin in the Kingdom of Prussia, with intent to prejudice, damage and defraud the said Discontogesellschaft, and others.

The complainant further complains that also, to-wit, in the month of March, April and May of the year 1901,, at, to-wit the City of Oberhausen within the jurisdiction of the Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, being a director of the Gerhard Terlinden Stock Company doing business at the City of Oberhausen within the jurisdiction of the Kingdom of Prussia and having charge of the account and invoice books of said Company, did then and there, with intent to cheat and defraud, make or cause to be made, false, fraudulent and fictitious entries in said account and invoice books and forged and altered a number of invoices in the same for the purpose of making it falsely appear that the said Gerhard Terlinden, alias Theodor Grafe, and sold and delivered to various customers large amounts of goods and had drawn on them his drafts therefor, when in truth and in fact the Gerhard Terlinden, alias Theodor Grafe, did not supply said goods and did not have them on hand, and by means of such forged entries and invoices the said Gerhard Terlinden, alias Theodor Grafe, deceived and defrauded a large number of customers with whom he was then and there
21 doing business, and particularly the Barmer Bank Verein, a banking firm in the City of Barmen, within the jurisdiction of the Kingdom of Prussia.

And the undersigned further complains that also, to-wit on the 29th day of April, 1901, at Oberhausen within the jurisdiction of the Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, having in his possession and custody a certain bill of exchange, dated Oberhausen, (Rhineland) the 29th of April, 1901, drawn by the Gerhard Terlinden Stock Company upon one Heh. (Heinrich) Schulte of Sterkrade in said Kingdom of Prussia, for the sum of nine thousand five hundred and eighty two Marks and thirty-five pfennigs, payable to the order of Barmer Bank Verien Heinsberg Fisher & Co., at the Branch of the Imperial Bank in Oberhausen on the 30th day of July

Exhibit D—Complaint of Sep 25, 1901

in said year 1901, did then and there, to-wit, on said 29th day of April, 1901, at Obenhausen aforesaid, feloniously forge upon the said bill of exchange an acceptance which said acceptance is entered in the margin of said bill of exchange and is as follows, towit, "Hch Schulte" with intent to prejudice damage and defraud the said Barmer Bank Verein Heinsberg Fisher & Co. contrary to the laws of the said Kingdom of Prussia.

And the undersigned further complains that also, to-wit the 29th day of April, 1901, at Oberhausen within the jurisdiction of the Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, having in his possession and custody a certain bill of exchange, dated Oberhausen (Rhineland) the 29th day of April, 1901, drawn by the Gerhard Terlinden Stock Company upon one Hch. Schulte of Sterkrade in said Kingdom of Prussia, for the sum of Nine thousand five hundred and eighty two marks and thirty-five pfennigs payable to the order of the Bremer Bank Verein Heinsberg Fisher & Co., at the branch of the Imperial Bank in Oberhausen, on the 30th day of July of said year 1901, did then and there, to-wit, on the said 29th day of April, 1901, at Oberhausen aforesaid, feloniously cause to be forged upon said bill of exchange an acceptance which said ac-
22 tance is entered on the margin of said exchange and is as follows to wit, "Hch. Schulte," which said forgery was caused to be made by the said Gerhard Terlinden, alias Theodor Grafe, with intent to prejudice, damage and defraud the Barmer Bank Verein Heinsberg Fisher & Co., contrary to the laws of the said Kingdom of Prussia.

And the undersigned further complains, that also, to-wit on the 27th day of April, A. D. 1901, at Oberhausen within the jurisdiction of the Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, having in his possession and custody, a certain bill of exchange, dated Oberhausen (Rhineland) the 27th day of April, 1901, drawn by the Gerhard Terlinden Stock Company upon one Wilhelm Seven of Essen in said Kingdom of Prussia, for the sum of six and twenty thousand two hundred and fifty marks paybale to the order of the Barmer Bank Verein Heinsberg Fischer & Co., on the 30th day of July, 1901, did then and there, to-wit, on the said 27th day of April, 1901, at, to-wit, Oberhausen aforesaid, feloniously and with intent to cheat and defraud the said Bank Verein Heinsberg Fischer & Co., forge upon said bill of exchange an acceptance, which said forged acceptance is entered upon the margin of said bill of exchange and is as follows, to-wit, "Wilhelm Seven" contrary to the laws of the said Kingdom of Prussia.

And the undersigned further complains that also, towit, on the 27th day of April, 1901, at Oberhausen within the jurisdiction of the King-

Exhibit D—Complaint of Sept. 3, 1901.

dom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, having in his possession and custody a certain bill of exchange, dated Oberhausen, Rhineland, the 27th of April, 1901, drawn by the Gerhard Terlinden Stock Company upon one Wilhelm Seven of Essen in said Kingdom of Prussia, for the sum of six and twenty thousand two hundred and fifty marks, payable to the order of the Barmer Bank Verein Heinsberg Fischer & Co., on the 30th of July, 1901, did then and there, to-wit, on the said 27th day of April, 1901, at, to-wit,
23 Oberhausen aforesaid, feloniously and with intent to cheat and defraud the said Barmer Bank Verein Heinsberg Fischer & Co., caused to be forged on said bill of exchange an acceptance which said forged acceptance is entered upon the margin of said bill of exchange and is as follows, to-wit, "Wilhelm Seven," contrary to the laws of the Kingdom of Prussia.

And the undersigned further complains that, also, to-wit, on the 18th day of April, 1901, at, to-wit, the city of Oberhausen, within the jurisdiction of said Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, having in possession and custody a certain bill of exchange, dated Oberhausen, Rhineland, the 18th day of April, 1901, drawn by the Gerhard Terlinden Stock Company upon one Wilh. Seven of Essen in said Kingdom of Prussia for the sum of Twenty five thousand nine hundred and twelve marks and 45 pfennigs, payable to the order of the Barmer Bank Verein Heinsberg Fischer & Co., on the 21st day of July, 1901, did then and there, on to-wit, the said 18th day of April, 1901, at, to-wit Oberhausen aforesaid, feloniously and with intent to cheat and defraud the said Barmer Bank Verein Heinsberg Fischer & Co., forge upon the said bill of exchange an acceptance, which said forged acceptance is entered upon the margin of said bill of exchange as follows, to-wit, "Wilh. Seven," contrary to the laws of the said Kingdom of Prussia.

And the undersigned further complains that also, to-wit on the 18th day of April, 1901, at to-wit, the City of Oberhausen within the jurisdiction of said Kingdom of Prussia, said Gerhard Terlinden, alias Theodor Grafe, having in his possession and custody a certain bill of exchange, dated Oberhausen, Rhineland, the 18th day of April, 1901, drawn by the Gerhard Terlinden Stock Company upon one Wilh. Seven of Essen in said Kingdom of Prussia, for the sum of twenty five thousand nine hundred and twelve Marks and 45 forty five pfennigs, payable to the order of the Barmer Bank Verein Heinberg Fischer
24 & Co., on the 31st day of July, 1901, did then and there, on, to-wit, the said 18th day of April, 1901, at, to-wit, Oberhausen aforesaid, feloniously and with intent to cheat and defraud the said Barmer Bank Verein Heinsberg Fischer & Co., caused to be forged upon said bill of exchange an acceptance, which said forged accept-

ance is entered upon the margin of said bill of exchange and is as follows to-wit, "Wilg. Seven," contrary to the laws of the said Kingdom of Prussia.

And the undersigned further complains that, also, to-wit, on the 29th day of April, 1901, at, to-wit, the City of Oberhausen within the jurisdiction of the Kingdom of Prussia, the said Gerhard Terlinden alias Theodor Grafe, having in his possession and custody, a certain bill of exchange, dated Oberhausen, Rhineland, the 29th day of April, 1901. Drawn by the Gerhard Terlinden Stock Company upon Hch. Schulte of Sterkrade in the said Kingdom of Prussia, for the sum of Nine thousand five hundred and eighty two Marks and thirty-five pfennigs payable to the order of Barmer Bank Verein Heinsberg Fischer & Co., at the branch of the Imperial Bank of Oberhausen on the 30th day of July, 1901, and bearing on the margin thereof the forged acceptance of the drawee, Hch. Schulte, did then and there, on, to-wit, said 29th day of April, 1901, at Oberhausen aforesaid, knowing the acceptance upon said bill of exchange to be forged, feloniously and with intent to cheat and defraud the Barmer Bank Verein Heinsberg Fischer & Co., of Barmen in the Kingdom of Prussia and others, utter and dispose of the said Barmer Bank Verein Heinsberg Fischer & Co., the said forged bill of exchange bearing said forged acceptance as aforesaid, contrary to the laws of the Kingdom of Prussia.

And the undersigned further complains also, that, towit, on the 27th day of April, 1901, at to-wit, the city of Oberhausen within the jurisdiction of the Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, having in his possession and custody a certain 25 bill of exchange, dated Oberhausen, Rhineland, the 27th of April, 1901, drawn of the Gerhard Terlinden Stock Company upon one Wilhelm Seven of Essen in said Kingdom of Prussia, for the sum of six and twenty thousand two hundred and fifty Marks payable to the order of Barmer Bank Verein Heinsberg Fischer & Co., on the 30th of July, 1901, and bearing on the margin thereof the forged acceptance of the drawee Wilhelm Seven, did then and there, on to-wit, said 27th day of April, 1901, at Oberhausen, aforesaid, knowing the acceptance upon said bill of exchange to be forged, feloniously and with intent to cheat and defraud the Barmer Bank Verein Heinsberg Fischer & Co., of Barmen in the Kingdom of Prussia and others, utter and dispose of to the said Barmen Bank Verein Heinsberg Fischer & Co., the said forged bill of exchange bearing said forged acceptance as aforesaid, contrary to the laws of the Kingdom of Prussia.

And the undersigned complains that also, to-wit on the 18th day of April, 1901, at to-wit, the City of Oberhausen within the jurisdiction of the Kingdom of Prussia, the said Gerhard Terlinden, alias Theodor Grafe, having in his possession and custody a certain bill of exchange,

Exhibit D—Complaint of Sept. 5, 1901

dated Oberhausen, Rhineland, the 18th day of April, 1901, drawn by the Gerhard Terlinden Stock Company upon one Wilh. Seven of Essen in said Kingdom of Prussia, for the sum of twenty five thousand nine hundred and twelve Marks, and forty-five pfennigs, payable to the order of the Barmer Bank Verein Heinsberg Fischer & Co., on the 31st day of July, 1901, and bearing on the marign thereof the forged acceptance of the drawee Wilh. Seven, did then and there, on to-wit, said 18th day of April, A. D. 1901, at Oberhausen aforesaid, bearing the acceptance upon said bill of exchange to be forged, feloniously and with intent to cheat and defraud the Barmer Bank Verein Heinsberg Fischer & Co., of Barmen in the Kingdom of Prussia, and others, utter and dispose of the said Barmer Bankverein Heinsberg, Fischer & Co., the said
26 bill of exchange bearing said forged acceptance, contrary to the laws of the Kingdom of Prussia.

The undersigned further represents and shows that the said several crimes of forgery and counterfeiting and utterance of said several forged and counterfeited instruments as herein above recited are fully shown by the testimony of a number of witnesses heard before the examining Judge of the "Landgericht" (Circuit Court) at the city of Duisburg in the said Kingdom of Prussia, a court of competent jurisdiction in which the matter of the penal investigation instituted against the said Gerhard Terlinden, alias Theodor Grafe is now pending, in order that he may answer for said several crimes; and the undersigned herewith submits to the Commissioner and files with this complaint a copy of all depositions of witnesses taken in said matter, together with a copy of the warrant of arrest issued by said Court against the said Gerhard Terlinden, alias Theodor Grafe and of the provision of the penal code of the German Empire applicable to said several crimes and providing punishment therefor, all of which instruments, written in the German language, are duly authenticated by Andrew D. White, ambassador of the United States of America at the Court of Berlin, in manner and form as required by the Acts of Congress in such case made and provided. And the undersigned also brings here and files herewith a duly verified English interpretation of all of said German instruments.

And the complainant further says that the said Gerhard Terlinden, alias Theodor Grafe, was at the time of committing the said crimes of forgery and counterfeiting and the utterance of said several forged and counterfeited instruments a subject of the said Kingdom of Prussia, and the said Gerhard Terlinden, alias Theodor Grafe, is now a fugitive from the said Kingdom of Prussia; that on or about the 1st day of July, A. D. 1901, he fled into the jurisdiction of the United States of America for the purpose of seeking an asylum therein, that he is now within
27 the Northern District of Illinois and that the crimes with which

the said Gerhard Terlinden, alias Theodor Grafe, is charged, are crimes embraced within the treaty of extradition between the United States of America and the Kingdom of Prussia concluded on the 16th day of June, 1852 and ratified May 3rd, 1853.

The undersigned therefore prays that a warrant be issued for the apprehension and commitment of said Gerhard Terlinden, alias Theodor Grafe, in order that the evidence of his criminality may be inquired into, and that the said Gerhard Terlinden, alias Theodor Grafe, may be extradited and delivered up to justice of the said Kingdom of Prussia, in accordance with the stipulations of the said treaty and the acts of Congress passed in pursuance thereof.

Signed DR. WALTHER WEVER.

United States of America, } ss.
Northern District of Illinois. }

Walther Wever, Imperial German Counsul at Chicago in the Northern District of Illinois, being duly sworn according to law, deposes and says that the foregoing complaint by him subscribed is true.

Signed DR. WALTHER WEVER.

Subscribed and sworn to before me this 25th day of September, 1901.

MARK A. FOOTE,
Commissioner.

Exhibit C—rant.

EXHIBIT "C."

28

United States of America, } ss.
Northern District of Illinois }

The President of the United States of America, to the Marshals of the United States for any District respectively, and to their Deputies, or the Deputies of any of them or to any of said Deputies, Greeting:

Whereas, complaint has been made on the oath of Dr. Walther Wever, Imperial German Consul at Chicago and for the Consular District comprising said Northern District of Illinois, before Mark A. Foote, a commissioner specially appointed and authorized by the District Court of the United States for the Northern District of Illinois, to execute the act of Congress entitled "an act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivering up of certain offenders" approved August 12, 1848, and the act entitled "an act to amend the act entitled " an act for giving effect to certain treaty stipulations between

bit C—War- this and foreign governments for the apprehension and delivering up
it, of certain offenders," approved June 22, 1860, that one Gergard Terlinden, alias Theodor Grafe, did at various times, to wit, within the months of March, April and May in the year A. D. nineteen hundred and one, within the jurisdiction and government of the Kingdom of Prussia, commit the crimes of Forgery and Counterfeiting and Utterance of forged instruments.

And whereas it is also shown in and by said complaint that the said Gerhard Terlinden, alias Theodor Grafe, was at the time of committing the said crimes of forgery and counterfeiting and utterance of forged and counterfeited instruments a resident in and a sub-
29 ject of the Kingdom of Prussia, and that he is a fugitive from the justice of the Kingdom of Prussia; that, on or about the first day of July nineteen hundred and one, he fled into the jurisdiction of the United States of America, for the purpose of seeking an asylum therein, and that the said crimes with which the said Gerhard Terlinden, alias Theodor Grafe is charged are embraced in the Treaty of Extradition between the United States of America and the Kingdom of Prussia concluded on the 16th of June 1852 and ratified May 30th, 1853.

These are therefore to command you, and each of you, forthwith to apprehend the said Gerhard Terlinden, alias Theodor Grafe, and to bring him before the said Mark A. Foote, Commissioner aforesaid, or before any other commissoner of the United States of America, duly authorized as aforesaid, or before any Justice of the Supreme Court, Circuit Judge or District Judge of the United States of America, to answer the premises, and further to be dealt with according to law and the provisions of said treaty.

In witness whereof, I have hereunto set my hand as such commissioner, at my office in said District this day of September nineteen hundred and one.

_____

Commissioner.

Endorsed: 9377. U. S. District Court, Northern District of Ill. In re. Gerhard Terlinden. Petition for Habeas Corpus. Filed Oct. 16, 1901, at o'clock M. T. C. MacMillan, Clerk. $10.00 Deposit. Albert W. May, A. C. Umbreit, Milwaukee.

30 And afterwards, to wit, on the 17th day of October, A. D. 1901, the following order was had and entered of record in said cause before the Honorable Christian C. Kohlsaat, Judge, towit:

In re petition of
9377 Gerhard Terlinden,
for a writ of habeas corpus.

Order of Oct. 1 1901, allowing writ to issue.

On motion of Albert W. May, Esq., Attorney for the relator in the petition filed herein and on notice to William Vocke, Esq., Attorney for the German Government, It is ordered that a writ of Habeas Corpus issue to John C. Ames, Marshal of the United States for the Northern District of Illinois, according to the prayer of said petition and that the said writ be made returnable on the twenty-first day of October, A. D. 1901, at the hour of ten o'clock A. M. of said day.

31 And afterwards, to wit, on the 17th day of October, A. D. 1901, there was issued out of and under the seal of said Court, in the above entitled cause, a Writ of Habeas Corpus, said Writ of Habeas Corpus being in the words and figures following, to wit:

32 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In the matter of the petition of
Gerhard Terlinden. } Habeas Corpus.

Return to writ habeas corpus Oct. 21, 1901.

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States, for the Northern District of Illinois.

I, John C. Ames, to whom the attached writ is directed, hereby certify and make return to the writ of habeas corpus, issued in this case, that I am the Marshal of the United States, for the Northern District of Illinois, and that I arrested said petitioner within said District on the 26th day of September, 1901, upon a warrant duly issued by Mark A. Foote, a United States Commissioner specially appointed and authorized by the District Court of the United States for the Northern District of Illinois to hear applications for extradition and to issue warrants therefor, which said warrant was duly issued by said Commissioner upon a complaint duly made by Walther Wever, Imperial German Consul at Chicago as representative of the Kingdom of Prussia, charging said Gerhard Terlinden, who, it appears, falsely assumed in this country the name of Theodor Grafe, with having, as a subject of the Kingdom of Prussia and within the jurisdiction of the said Kingdom, committed the crimes of forgery, counterfeiting and the utterance of forged instruments, and with being

urn to writ of
abeas corpus,
led Oct. 21,
901

a fugitive from the justice of said kingdom of Prussia, and charging that the crimes with which said Gerhard Terlinden is charged are embraced in the Treaty of Extradition between the United States of America and the Kingdom of Prussia concluded on the 16th of June 1852 and ratified May 30th, 1853; and I further certify and return that I duly produced said petitioner at each and every hearing appointed and held before said Commissioner Mark A. Foote in the matter of said application, and after each and every hearing I
33 held said petitioner under commitment duly issued by said United States Commissioner and that I now hold the above named petitioner in my custody as such Marshal by virtue of a certain Commitment issued by Mark A. Foote, Commissioner as aforesaid, on the 26th day of September A. D. 1901. Copies of said warrant and of said commitment are attached hereto, directing me as said Marshal to forthwith commit the said petitioner to the jail of the County of Cook, State of Illinois, until he be discharged therefrom by due course of law.

Nevertheless I have the body of the said petitioner now before this Honorable Court.

Dated, this 21st day of October A. D. 1901.

JOHN C. AMES, *U. S. Marshal,*
By EDWARD ST. CLAIR, *Deputy.*

of commit- 34

COPY OF COMMITMENT.

The President of the United States of America, to the Marshal of the Northern District of Illinois, and to the keeper of the Common jail of the County of Cook in said District, Greeting:

Whereas, Gerhard Terlinden alias Theodor Grafe, has been apprehended and brought before the undersigned, Mark A. Foote, United States Commissioner for the District aforesaid, for examination, by virtue of a warrant of the said Commissioner issued upon complainant made before him, in writing, on oath, charging the said Gerhard Terlinden, alias Theodor Grafe, with forgery, counterfeiting and the utterance of forged and counterfeited instruments in the Kingdom of Prussia and with now being a fugitive from the justice of said Kingdom.

And whereas, the examination of the said charges has been adjourned for good cause appearing, until the 16th day of October A. D. 1901, at ten o'clock A. M. Now, therefore, you the said Marshal, are hereby commanded that you convey the said Gerhard Terlinden, alias Theodor Grafe, to the said jail, and that you have him before the said Commissioner at his office in Chicago, in the said Dis-

trict, at the time so fixed for such examination, and thenceforth from day to day until conclusion thereof; And you, the said keeper of the said jail, are hereby commanded that you receive the said Gerhard Terlinden, alias Theodor Grafe, into the said jail, and him there safely keep, in accordance with the command hereof to the said Marshal.

Witness the hand and seal of the said Commissioner at Chicago aforesaid, this 26th day of September A. D. 1901, and of the Independence of the United States the 126th year.

(Signed) MARK A. FOOTE,
U. S. Commissioner Nor. Dist. Ill.

35

RECEIPT OF JAILOR.

Receipt of jailor.

Received from John C. Ames, U. S. Marshal, Northern District of Illinois, the body of the within named, this 26th day of September A. D. 1901.

JOHN L. WHITMAN,
Jailor Cook County.

(Signature of Officer making Commitment.)
EDWARD ST. CLAIR.

United States of America, Northern District of Illinois. } ss.

I have executed this writ within my district by delivering the body of the within named Gerhard Terlinden, alias Theodor Grafe, to John L. Whitman, Keeper of the Cook County Jail, this 26th day of September A. D. 1901.

JOHN C. AMES, *U. S. Marshal,*
By EDWARD ST. CLAIR, *Deputy.*

Endorsed: (Original) No.———. Northern District of Illinois, Before Mark A. Foote, Commissioner, etc. The United States vs. Gerhard Terlinden, alias Theodor Grafe. Mittimus on Adjournment. Filed——189 . U. S. Commissioner.

of warrant. 36

COPY OF WARRANT.

United States of America,
Northern District of Illinois. } ss.

The President of the United States of America, To the Marshals of the United States for any District respectively, and to their Deputies, or the Deputies of any of them, or to any of the said Deputies, Greeting:

Whereas, complaint has been made on the oath of Dr. Walther Wever, Imperial German Consul at Chicago and for the Consular District comprising said Northern District of Illinois, before Mark A. Foote, a commissioner specially appointed and authorized by the District Court of the United States for the Northern District of Illinois, to execute the Act of Congress entitled "an act for giving effect "to certain treaty stipulations between this and foreign governments "for the apprehension and delivering up of "certain offenders" ap- "proved August 12, 1848, and the act entitled "an act to amend the "act entitled 'an act for giving effect to certain treaty stipulations " 'between this and foreign governments for the apprehension and " 'delivering up of certain offenders'," approved June 22, 1860, that one Gerhard Terlinden, alias Theodor Grafe, did at various times, to wit, within the months of March, April and May in the year A. D. nineteen hundred and one within the jurisdiction and government of the Kingdom of Prussia, commit the crimes of Forgery and Counterfeiting and Utterance of forged instruments.

And whereas it is also shown in and by said complaint that the said Gerhard Terlinden, alias Theodor Grafe was at the time of committing said crimes of forgery and counterfeiting and utterance of forged and counterfeited instruments a resident in and a subject of the kingdom of Prussia, and that he is a fugitive from the kingdom of Prussia; that, on or about the first day of July nineteen hundred and one, he fled into the jurisdiction of the United States of America, for the purpose of seeking an asylum therein, and that the said crimes with which the said Gerhard
37 Terlinden, alias Theodor Grafe is charged are embraced in the Treaty of Extradition between the United States of America and the Kingdom of Prussia concluded on the 16th of June 1852 and ratified May 30th, 1853.

These are therefore to command you, and each of you, forthwith to apprehend the said Gerhard Terlinden, alias Theodor Grafe, and to bring him before the said Mark A. Foote, Commissioner aforesaid, or before any other Commissioner of the United States of America duly authorized as aforesaid, or before any Justice of the Supreme Court,

Return to writ of habeas corpus filed Oct. 21, 1901.

Circuit Judge or District Judge of the United Sates of America, to answer the premises, and further to be dealt with according to law and the provisions of said treaty.

In witness whereof, I have hereunto set my hand as such Commissioner, at my office in said District, this 25th day of September nineteen hundred and one.

MARK A. FOOTE,
Commissioner.

Rec'd this warrant on the 26th day of Sept. A. D. 1901 at Chicago, Ill., and have executed the same by arresting the within named Gerhard Terlinden alias Theodor Grafe, at Chicago, Ill's the 26th day of Sept., A. D. 1901, and have his body now in Court as within, I am commanded.

JOHN C. AMES, *U. S. Marshal.*
EDWARD ST. CLAIR, *Deputy.*

38 District Court of the United States of America, } ss.
Northern District of Illinois. }

Writ.

The United States of America To John C. Ames, Marshal of the United States, for the Northern District of Illinois—Greeting:

We command you that you do on Monday, October 21, 1901, at ten o'clock A. M., without excuse or delay, bring or cause to be brought before the District Court of the United States of America, for the Northern District of Illinois, now sitting in the Court Room of said District Court, in the City of Chicago, in said District, the body of Gerhard Terlinden, by whatever name or addition he is known or called, and who is unlawfully detained in your custody, as it is said, together with the day and cause of his caption and detention then and there to perform and abide such order and direction as our said District Court shall make in that behalf. Hereof make due return under the penalty of what the law directs.

To the Marshal of the Northern District of Illinois to execute.

Witness the Hon. Christian C. Kohlsaat, Judge of the District Court of the United States of America, at Chicago, aforesaid this 17th day of October, in the year of our Lord one thousand nine hundred and one and of our independence the 126th year.

T. C. MACMILLAN,
Clerk.

Indorsed: Filed Oct. 21, 1901, at o'clock M. T. C. MacMillan, Clerk.

39 And afterwards, to-wit, on the 21st day of October, A. D. 1901, the following order was had and entered of record in said cause before the Honorable Christian C. Kohlsaat, Judge, to-wit:

In re petition of
9377 Gerhard Terlinden
for writ of habeas corpus.

Oct. 21 This cause coming on to be heard on the return of the United 28, 1901. States Marshal to the writ of habeas corpus heretofore issued herein, come the parties by their attorneys and the relator in custody of the Marshal, and after arguments of counsel the Court not being now fully advised in the premises, it is Ordered that this matter be further submitted to the Court on briefs to be filed in five days and that this matter be set down for further hearing on October 28, A. D. 1901, at ten o'clock A. M.

40 And afterwards, to-wit, on the 28th day of October, A. D. 1901, the following order was had and entered of record in said cause before the Honorable Christian C. Kohlsaat, Judge, to-wit:

In re petition of
9377 Gerhard Terlinden
for a writ of habeas corpus.

This matter coming on to be heard on the return of the Marshal to the writ of habeas corpus issued herein come the parties by their attorneys and on motion It is Ordered by the Court that the hearing of said matter be and the same is continued until to-morrow morning at ten o'clock.

41 And afterwards, to-wit, on the 28th day of October, A. D. 1901, there was filed in the Clerk's Office of said Court, in the above entitled cause, a Traverse to return; said Traverse to Return being in the words and figures following, to-wit:

42 DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois.

In re Habeas Corpus
Gerhard Terlinden.

Traverse, filed Oc 28, 1901.

The above named petitioner, traversing the return of the U. S. Marshal to his petition herein, alleges that on the twenty-sixth (26th) day of September 1901, a complaint was filed with Mark A. Foote, Erquire, United States Commissioner upon which a warrant was issued and your petitioner arrested; that with such complaint so iussed there were filed copies of the original testimony and translations of the same contained in depositions taken before certain court officers in the Empire of Germany, relative to the alleged officers with which said complaint charges your petitioner; that said complaint refers to said deposition so filed in words following, to-wit:

"And the undersigned also brings here and files herewith a duly verified English interpretation of all of said German instrument";

and also refers to said deposition in words, as follows, to wit:

"And the undersigned herewith submits to the commissioner and files with this complaint a copy of all depositions of witnesses taken in said matter, together with a copy of the warrant of arrest issued by said court against the said Gerhard Terlinden, alias Theodor Graefe and of the provisions of the Penal Code of the German Empire applicable to said several crimes and providing punishment therefor."

That the provisions of the Criminal Code of the German Empire applicable to the facts and circumstances of this case as shown
43 by the evidence hereto annexed are sections 240, 47, 49 first paragraph; section 360 fourth and fifth paragraphs; section 275 and section 56 of the Code of Criminal procedure, also section 234 of the Civil Code, a correct translation of which sections are hereto annexed and marked Exhibit "B" and made a part hereof.

That said depositions so filed do not show or tend to show that your petitioner is guilty of any extraditable offense; that a copy of said deposition so referred to in said complaint and heretofore filed with said commissioner is hereto attached marked Exhibit "A" and made a part of this traverse.

Wherefore your petitioner prays that the return of the U. S. Marshal herein be dismissed and your petitioner discharged.

GERHARD TERLINDEN,
Petitioner.

State of Illinois
Cook County. } ss.

Gerhard Terlinden being first duly sworn on oath deposes and says that he has heard read the foregoing traverse and understands the contents thereof; that the same is true of his own knowledge except as to matters therein alleged upon information and belief, and as to such matter he believes it to be true.

GERHARD TERLINDEN.

Subscribed and sworn to before me this 25th day of October, A. D. 1901.

WILL T. DAVIS,
Notary Public.

[SEAL]

al code, 44
. 240, 47.

EXHIBIT "B."

CRIMINAL CODE, SECTION 240.

Any person who shall, unlawfully and forcibly or by threatening a felony or misdemeanor, compel another to do, suffer or omit an act, shall be punished by imprisonment not more than one year or by a fine not exceeding 600 Marks.

The attempt is punishable.

Same. Section 47.

If several persons commit a crime jointly, each shall be punished as principal.

Same. Section 49 (1st paragraph).

Any person who has, knowingly by counsel or deed, assisted the prinicpal in the commission of a felony or misdemeanor, shall be punished as an accomplice.

CRIMINAL CODE, SECTION 360.

Every person shall be punished by fine not exceeding 150 Marks, or by confinement.

1. * * * *
2. * * * *
3. * * * *
4. * * * * who shall, without a written order from a public authority, make or deliver to any person other than the authority dies, seals, engravings, plates, or other forms that may be used to make specie or paper money, or make such papers as are considered equivalent to paper money under Section 149, or stamped

Criminal code, Secs. 360, 234

paper, tax-stamps, stamped blanks, stamp impressions, postage or telegraph stamps, public receipts or certificates.

5. * * * * who shall without written order from a public authority, undertake to make impressions from the dies, seals, engravings, plates or forms mentioned in subdivision 4, or to print blanks for the public papers, certificates or receipts described therein, or who shall furnish any impression to any other person than the public authority.

Same. Section 275.

Every person shall be punished by imprisonment not less than three months, who

1. Shall knowingly make use of false or forged stamped paper, false or forged tax-stamps, stamped blanks, stamp impressions, postage or telegraph stamps or stamped envelopes.

2. Shall with intent to use the same as genuine make false stamped paper, false tax-stamps, stamped blanks, or stamp impressions for playing cards, passports or other printed matter or documents or false postage or telegraph stamps or stamped envelopes;

3. Shall, with the intent to use the same at a higher value, forge genuine stamped paper, genuine tax-stamps, stamped blanks, stamp impressions, postage or telegraph, or stamped envelopes.

Civil code, Sec. 234

Civil Code—Section 234.

Negotiable instruments are available as securities only in case they are drawn in favor of the holder, are marketable on 'Change and belong to a class in which the funds of wards may be invested. Papers made out to order and endorsed in blank are equivalent to papers in favor of the holder.

Interest—rent—dividend—and renewal coupons, must be deposited with the negotiable instrument.

Negotiable instruments shall be taken as security only in the amount of three fourths of their value quoted on 'Change.

Code of Criminal Procedure, Section 56.

Nobody shall be sworn

1. * * * *

2. * * * *

3. * * * * who is under suspicion, or already sentenced, as accomplice, or accessory before or after the fact in the crime forming the subject of the examination.

sition of
ear Heinrich.

State of Wisconsin, } ss.
Milwaukee County. }

Oscar Heinrich, being first duly sworn, on oath deposes and says, that he is a resident of the City of Milwaukee, Wisconsin, and has been such for the past fifteen years; that he spent several years in Germany and there studied law for the purpose of becoming a practicing attorney in that country; that he is familiar with and knows the provisions of the Constitution, Civil and Penal Code of the German Empire now in force; that he is conversant with and understands both the German and English languages; that he has made the annexed translations of certain sections and parts of sections of the German Constitution and the German Civil and Penal Codes, and that said translation is a correct, fair and full translation from the German into the English language; that from his own knowledge he knows that the translations hereto annexed are the translations of the official and authentic provisions of the Constitution, Civil and Penal Codes of the German Empire, as they now exist, indicated by the number of the article, or section, or parts of articles or sections, as identified by the proper reference found at the beginning of each article, section or part of article or section, found in the annexed translation.

OSCAR HEINRICH.

Subscribed and sworn to before me this 19th day of October, 1901.

A. C. UMBREIT,
Notary Public, Milwaukee, Wis.

47 ROYAL CIRCUIT COURT (LANDGERICHT).

Present:
Circuit Judge Dr. Vygen as examining judge.
Bergefurth as clerk.

Duisburg, August 21, 1901.

In the penal matter against the factory director Gerhard Terlinden for forgery of instruments there appeared the following named witnesses:

The witnesses having been made acquainted with the subject matter of the investigation and the person of the accused, were separately and each in the absence of the witnesses to be heard later, examined as follows, after their attention had been called to the import of the oath:

Exhibits to Traverse.

First witness: After being duly sworn as witness: My name is Ludwig Schulte, boss painter. I am 31 years old, of the evangelical confession, not related to the accused by blood or marriage.

As to the subject matter: In March 1901 I was one day directed by Terlinden to engrave and etch upon a steel plate an eagle and a circumscription in accordance with a pattern, namely in the manner in which I usually make plates of that kind for the press in preparing paintings. The pattern given me was a closely clipped piece of paper. On the back the paper was soiled. On the face was an eagle, under it the number 38 and around it a circumscription which read: "Imperial Stamp Duty, two per centum." The pattern given me looked exactly like the impress of stamp 38. Since Terlinden's demand appeared to me to be peculiar, I looked at him in astonishment. Terlinden thereupon said to me: "You needn't look at me so stupidly. You may safely do that. I take that upon myself. I have blundered a little and do not want to expose myself to blame. I don't want to put my head in the hole. I need it only for two things. You must make that. If you don't make it you can't keep your position, then I discharge you."

48 Since I took Terlinden for an honest and pious man and was afraid of losing my position, I made the plate according to direction in the factory, respectively in the office. For I wish to mention that at that time I was as well as to-day employed in the Terlinden works as poss-painter and master-enameler.

Some little time later about April of this year, one evening towards eight o'clock I did by Terlinden's order together with the then night watchman and now gatekeeper, Wissinger, bring a press from the paint shop to the office of Miss Barth. That room is a private office in the warerooms. As Wissinger told me the press was brought back to the paint shop next morning by a hired girl and himself. Afterwards I did not see the plate again except on the occasion on which I had to give Kosbadt an illustration of making an impress.

On the evening when in the spring of this year I took the press from the paint shop to the private office in the upper floor, Terlinden after a little while came to me while I was still standing downstairs with the gatekeeper or in the kutchen, and said I should go and get a new plate with flower patterns which, as he knew, I had shortly before prepared. I thereupon got this plate and went with it to the private office which is located upstairs in the private dwelling of Terlinden on the same floor to which I had theretofore brought the press. When I was upstairs in the room I made prints from the flower plate. After I had been there a short time Miss Barth came in and Terlinden said to me I should show the Miss how to do that. I then briefly showed her how to go and do it, without, however,

Edition of Ludwig Schulte.

instructing her *very minutely*. And she did not inquire more closely concerning it and made no tests in my presence. Soon thereafter I went away, and I believe Miss Barth had already left before me. But before I went away Terlinden called the business manager Kosbadt upstairs by telephone. Kosbadt came and brought along the plate with the eagle stamp made by me. He had the same in his
49 hand. Thereupon Terlinden said to me: "Now show Kobadt how to do it," which I did accordingly, whereupon Terlinden said: "Now you may go." Thereupon I went. After I had made the plate with the eagle for Terlinden I had upon his behest to prepare the color like that which the stamp pattern had that Terlinden showed me. So I did this in a little pot. After that Kosbadt had me called and told me that the little pot with red color which I had made had been broken. I should make new color. So I did that. Terlinden was present when the direction was given me. He said I should make a little more, he wanted to use it for his hand stamp because the color was so nice.

The small bottle which the examining magistrate confiscated a few days ago is the same in which I prepared the color. I delivered it to the business manager Kosbadt at the time. Terlinden was familiar with the process of making imprints from plates on the press.

Read, approved and signed.

LUDWIG SCHULTE.

Second witness, after being duly sworn as witness: My name is Heinrich Schulte, dealer in railroad supplies, 34 years old, of evangelical religion, not related to the accused either by blood or marriage. As to the subject matter:

There was submitted to the witness the draft dated Oberhausen April 29th, 1901 for M9582.35. The draft reads as follows:

pr.———

M330584

Oberhausen (Rhineland) the 29th of April, 1901.

For 9582.35 Mks.

On the 30th day of July, a. c/ pay upon this first of exchange to the order of Barmer Bank Vereins Heinsberg Fischer & Co, the sum of marks nine thousand five hundred and eighty two and 35 Pfgs. for value received, and charge the same to our account as per advice

Exhibits to Traverse.

Gerhard Terlinden Akt–Ges
Kosbaldt p pa. Mueller

Mr. Heh. Schulte
Sterkrade.

Payable at branch of Imperial Bank, Oberhausen, Rhineland.
No. 35805.

(Across end:) First of Exchange. Gerhard Terlinden Stock Co., Oberhausen Rhineland. Hch. Schulte.

The witness deposes: "I did not write the acceptance upon this draft. I was formerly up to about the year 1895 foreman with Terlinden. Later on I made myself independent against his wish. Then he aided me. Then I gave him acceptances as accommodation. Later Tenlinden told me I should let him have my draft booklet in which I wrote drafts and should sign a few drafts in blank as acceptor. That would be so simple and he would not cheat me any way. So I let him have the booklet and rather often signed acceptances both in blank as well as such as were filled up. Then he made such drafts payable at the Imperial Bank and there redeemed them. I againt repeat that the acceptance of the draft shown to me is not mine."

Read, approved, signed.

HEINRICH SCHULTE.

The witnesses were sworn according to Par. 328, II of the code of criminal procedure. The witness Seven who was also summoned did not appear. A letter of excuse had arrived from him. He was summoned by telegraph for this afternoon.

Done as above.

Signed, DR VYGEN, *Circuit Judge.*
BERGERFURTH, *Clerk.*

Done at Duisberg the 21st of August, 1901.

In the Royal Chief Revenue Office.

In the matter of the investigation against Terlinden *et al*, the undersigned members of the court betook themselves this forenoon to the Royal Chief Revenue Office. There was found there the Revenue Councillor Mr. Rothe, who declared upon inquiry that the official who could give information from his own knowledge of the stamping of the Terlinden stock certificates was Chief Clerk Mr. Jahn. The latter soon appeared and was examined as a witness after his attention had been called to the import of an oath as follows:

After taking the witness oath, as to the person: My name is Emil Jahn, I am 35 years of age, of evangelical religion, not related to the accused by blood or marriage.

As to the subject matter: The stock company Gerhard Terlinden has twice during the last year presented certificates of stock to be stamped. For this stamping I handed out stamp No. 38 two per centum and after I had counted the certificates the stamping was executed with that stamp by subaltern officials. The stamp imprints now shown me and submitted by the Royal Chief Revenue Office on August 13th of this year are imprints of the same stamp and the same color with which the above mentioned Terlinden shares were here stamped.

Read, approved, signed,

EMIL JAHN, *Chief Clerk.*

Emil Clerk

The oath was administered to the witness in accordance with par. 322–II of the code of criminal procedure.

For authentication signed:

DR. VYGEN, *Circuit Judge.* BERGERFURTH, *Clerk.*

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52 ROYAL CIRCUIT COURT.

Present:

Circuit Judge Dr. Vygen as examining judge.

Bergenfurth as Clerk.

Duisberg, August 21, 1901.

In the penal matter against the factory director Gerhard Terlinden *et al* for forgery of instruments, there appeared, summoned Heinrich Latwesen of Barmen, the member with personal liability of the limited stock company Barmer-Bank-Verein Heinsberg-Fischer & Co. domiciled at Barmen.

The witness having been made acquainted with the subject matter of the investigation and with the person of the accused was separately and in the absence of the witnesses to be heard later examined as follows:

First witness: After taking the witness oath.

As to the person: My name is Heinrich Latwesen, I am 37 years old, of evangelical religion, not related to the accused by blood or marriage.

As to the subject matter: About in April or May of this year the Barmer Bank Verein was in doubt whether the drafts which it had in its hands from Terlinden were drawn against actual deliveries of goods as Terlinden had maintained particularly to me. For this reason an examination of the books of the Gerhard Terlinden Stock Company by my colleague Arrioni and another official in Oberhausen took place. In particular the invoice copy book was submitted to Director Arrioni that is to to say, the books into which the original invoices alleged to have been sent out were copied. It appeared that

Exhibits to Traverse.

the original invoices corresponded with the amounts of the drafts. This had come to my knowledge as well from a report in our files and also from personal statements of Director Arrioni who is at present absent on a trip to a watering place. Later on when the crash came, it became apparent, however, that the invoices which were submitted in the copy book were in fact fictitious. If this had in
53 any way appeared at the time of revision, or only an indication theref, we should not have kept on taking the drafts.

Read, approved, signed,

HEINRICH LATWESEN.

The attention of the second witness was called to the import of the oath.

After being duly sworn.

As to the person: My name is Wilhelm Seven, dealer in hardware and master blacksmith. I am 44 years old, of the evangelical confession, not related to the accused by blood or marriage.

As to the subject matter. There were submitted to the witness the two drafts acceptances of the 27th and 18th of April, 1901 for 26250 marks respectively 25912.45 marks, which read as follows, to-wit:

M 330532

Oberhausen, Rhineland, the 27th of April, 1901.

For m 26250

On the 30th of July, 1901 pay aainst this 1st of exchange to the order of Barmer Bank Verein Heinsberg-Fischer & Co. the sum of Marks six and twenty thousand two hundred and fifty, for value received, and charge same to account as per report.

To Mr. Wilhelm Seven,
Essen on the Ruhr,
Grabenstrasse
11/15

Gerhard Terlinden Stock Co.

(Sig) Kosbadt, p. pa. Miller

No. 25002.

(On the end of draft:)

First of Exchange
Gerhard Terlinden Stock Co.,
Oberhausen, Rhineland.
Will. Seven.

dition of Wil-
m Seven.

M 128966

Oberhausen Rhineland, the 18th of April, 1901.

For M 25912.45

On the 21st day of July, 1901, pay against this first of exchange to the order of the Barmer Bank Verein Heinsberg Fisher & Co., the sum of Marks Twenty five thousand nine hundred and twelve and 45 pfgs. for value received and charge same to account as per report.

To Mr. Wilhelm Seven,
Essen (on-the-Ruhr)

Gerhard Terlinden Stock Co.,
Sig. Kosbadt, p pa. Mueller

Grabenstrasse 11/15
(On the end of draft:)
First of Exchange
Gerhard Terlinden Stock Co.,
Oberhausen, Rhineland.
Wilh. Seven.

And the witness deposed: I did not execute the two acceptance signatures Wilhelm Seven. This I can say with absolute certainty, but I cannot testify who did execute the signatures. I was originally a master locksmith, afterwards I began in connection therewith a hardware business. In the year 1894 or in the latter part of 1893 I already entered into business relations with Terlinden. In the beginning I paid Terlinden for the goods generally in cash Afterwards when Terlinden made me cash advances for my house purchase I gave him for the advances draft acceptances. At first I then still paid for goods. As the drafts always became larger I at last, especially in the last two years no longer paid for the goods. My arrangement with Terlinden now was to the effect that the drafts should be as far prolonged until I was in a position to pay the same. Terlinden sent me drafts for acceptance in amounts as suited him. Generally there was at the upper right hand corner of the draft, the date when drawn and the date when due. Often however only the amount of the draft was given. I then provided the drafts with the acceptance and returned them. The two drafts shown to me here were not submitted to me for my signature. As a general rule I placed the acceptance upon the drafts at my house in Essen. In former years it happened to me exceptionally that I placed the acceptance upon the drafts at Terlinden's business rooms, but during the last year I signed in no case drafts in Terlinden's business rooms. As soon as I had accepted the drafts I entered them upon a book with the amount
55 of the drafts and the dates when the drafts matured.

I always had the money promptly sent to me by Terlinden. The two drafts this day shown to me do not appear in my book because they were not accepted by me.

Read, approved, signed.

WILH. SEVEN.

The oath was administered to the witness in accordance with Par. 328 II of the code of criminal procedure.

For authentication:

Sig. Dr. Vygen,
Circuit Judge.
Bergerfurth,
Clerk.

Royal Circuit Court.

Present:
Circuit Judge Dr. Vygen, as examining magistrate.
Bergerfurth, as clerk of court.

In the penal matter against Gerhard Terlinden *et al* for forgery of instruments there appeared at the instance of the Receiver in bankruptcy attorney Dr. Schultz, the civel engineer and director of the Hanover Brunswick Mining Co., a stock company, Alois Weiskopf of Hannover.

The witness having been made acquainted with the subject matter of the investigation and the person of the accused, was examined as follows, after his attention had been called to the nature of the oath.

1st witness: My name is Alois Weiskopf, civil engineer, 30 years of age of the mosaical faith.

As to the subject matter. I made the first investigations on the 30th of July of this year at the order of the Bank for Commerce and Industry in Berlin after the Terlinden crash occurred.

56 I first found in the secret room of Miss Barth stock certificates without numbers and stamps printed by Kuehne in Oberhausen. In the office used by Terlinden and Kosbadt I found unstamped numbered stock certificates printed by Gieseke & Devrien in Leipsic and by Bagel in Muelhlheim on-the-Ruhr. The stock certificates of the first issue are the certificates from 1 to 1800 and are printed by Geiseke & Devrien and are entered in the stock book. This issue was made in the year 1897. The second stock issue was made in the year 1900. Concerning this issue there is nothing whatever contained in the stock book. The stock certificates of this issue were prepared by Kuehne in Oberhausen, but also by Jockover in Duesseldorf and Bagel in Muehlheim on the Ruhr. This issue must have amounted to 1700 certificates. Concerning seventeen hundred certifictes made by Bagel, an invoice was issued on the 21st of July, 1901, so that consequently Bagel provided for the entire demand of stock certificates but besides Jockover and Kuehne also made certificates. There is no doubt that Terlinden as the head of the Terlinden Stock Company caused an entire iseries of stock certificates to be reprinted under old

ition of Alois skopf.

numbers and then provided them with a false imperial stamp or caused it to be done. The numbers evidently he also had imprinted upon the stock certificates himself. It is known to me that there were deposited by Terlinden in different banks at the same time certificates bearing the same numbers, so that one or the other of these stock certificates was certainly forged. Thus I know that there are lying in the Amsterdamsche Bank in Amsterdam the stock certificates number 1803 to 1935; that is, that in May of this year they were given by Terlinden as security; and that with Veit & Homburgher in Carlsruhe there lie also, given as security by Terlinden, the stock certificates numbered 1801 to 2220, hence the stock certificates
57 in the Amsterdamer bank are identical with those in the hands of Veit and Homburgher. I can therefore say positively that the certifiecats were forged by Terlinden in large amounts and given to different banks as security. As to the exact amount the extent cannot as yet be stated.

The method which Terlinden pursued in uttering the stock certificates was as follows:

He caused the banks to make him advancements and to open a credit. For this he perhaps gave forged stock, paid 6% Lombard interest and secured to the banks either one half, but at least nine per cent of the share of the profits upon each certificate of stock. In this manner he placed the false and genuine stock certificates with the different banks. He was the only stockholder of his company.

Read, approved, signed.

ALOIS WEISKOPF.

The oath was administered to the witness in accordance with Par. 328, 2 of the code of criminal procedure.

For authentication:

DR. VYGEN,
Circuit Judge.
BERGERFURTH,
Clerk.

Done at Oberhausen in the District Court Building on the 22nd day of August, 1901.

In the matter of the investigation against Gerhard Terlinden, factory director, *et al.*

The undersiguned officers of the court this day betook themselves to the above mentioned court building where they found the following named witnesses. The witnesses were made acquainted with the subject matter of the investigation and their attention having
58 been called to import the oath, they were thereupon separately and each in the absence of the witnesses to be heard later examined as follows:

Exhibits to Traverse.

The agent of the management of the Discontogesellschaft, Walter Schlauch, residing at Charlottenburg, after being duly sworn. As to the person;

My name is Walter Schlauch, I am 43 years old, of the evangelical confession, not related to the accused either by blood or marriage.

As to the subject matter:

In May of this year an arrangement was made between Terlinden and the management of the Discontogesellschaft in Berlin to the effect that the Discontogesellschaft should grant to the accused Gerhard Terlinden personally a credit of 400,000 Marks. Terlinden on the other hand obligated himself to deliver to the Discontogesellschaft as pledge stock certificates of the Gerhard Terlinden Stock company of the par value of 400,000 Marks. Terlinden sent these certificates by letter of the 22nd of May, 1901. There were 400 of them —to the Discontogesellschaft. The certificates bear the serial numbers 2901 to 3300, are dated Oberhausen in August, 1900 and all bear the same circular eagle-stamp with the circumscription "Imperial Stamp Duty 38 2 per centum."

I deliver herewith for the files one of the 400 stock certificates sent to us, which bears the numbers 2901 and otherwise reads as follows, to-wit:

Marks 1000.

Gerhard Terlinden Stock Company

of Oberhausen.

{Imperial Stamp Duty 38 Two per centum.} Stock certificate No. 2901.

For one thousand Marks.

59 The holder of this certificate is interested to the amount of one thousand marks in the Gerhard Terlinden Stock Company at Oberhausen as shareholder with all statutory rights and liabilities.

Oberhausen in August 1900.

Gerhard Terlinden Stock Company,
The Board of Control,
sig. Winterberg.
The Board of Mgrs.
sig. Gerh. Terlinden.

Entered in the Stock book
folio 30
sig. kosbadt.

(Gustav Jockover Duesseldorf 5517.)

ition of Wal- Schlauch.

The other certificates of stock in the possession of the Discontogesellschaft correspond fully with this certificate except as to the consecutive number and the folio of the stock book. I hereby deliver for the court files the original writing of Terlinden to the Discontogesellschaft at Berlin of the 22nd of May, 1901 with which the before mentioned stock cretificates were transmitted and in which the legal relations are laid down. This writing reads as follows:

Gerhard Terlinden
Telephone No. 27. 175073.

Oberhausen, Rhineland the 22nd of May, 1901.

Managers of the Discontogesellschaft,
Berlin, W.

Having returned from my trip I find your esteemed lines of the 20th inst. and confirm your advice that you are ready to grant to me a credit of four hundred thousand marks upon my depositing with you 400,000 marks par value of the stock certificates of the Gerhard Terlinden Stock Company, which credit is to be used by the Gerhard Terlinden Company by means of three months drafts drawn on you. I allow you for this transaction a commission of one third as a per cent and grant you in addition to possible interest to be figured to 60 one per cent higher than bank discount rate, a compensation equal to one fourth of the dividends accruing upon the stock certificates pro rata temporis. Should I proceed to place the stock certificates of the Gerhard Terlinden Stock Company on the market I shall communicate with you in this regard.

In two mail packages registered and insured I caused to be sent to jou for your kind use 400,000 marks par value stock certificates of the Gerhard Terlinden Stock Company, 400 pcs. Nos. 2901-3300 together with coupons and dividend certificates for 1901.

Herewith I also send to you in eight sections of Mk. 50,000 each Mk. 400,000 of own drafts of the Gerhard Terlinden Stock Co. due 23rd of August of the present year, which you will please discount for the drawer.

The value I request you to remit to me through the Gerhard Terlinden Stock Company, by check of the Reichsbank.

Very respectfully,

GERHARD TERLINDEN.

(Eight enclosures)
To be registered.

This letter has just been read to me and corresponds with the original letter delivered by me to be placed among the files.

Read, approved, signed.

DR. WALTER SCHLAUCH.

Witness and expert Arnold Bauer, attorney at law and notary. Deposition of Arnold Bauer.

Upon being sworn as witness and expert:

As to the person: My name is Arnold Bauer, I am 38 years old, belong to the evangelical confession, am not related to the accused by either blood or marriage.

61 As to the subject matter:

In my capacity as notary I have frequently certified the signatures of Terlinden and have otherwise seen many signatures of Terlinden.

The signature of Terlinden under the letter to the Discontogesellschaft at Berlin under the date of the 22nd of May, 1901 and now shown to me by the previous witness is the genuine and true signature of the accused Terlinden. I can assert this upon strength of my knowledge of said signature to the best of my knowledge and with full positiveness.

Read, approved, signed.

ARNOLD BAUER.

The oath was administered to the witness in accordance with Par 328–II of the code of criminal procedure.

The undersigned court officers thereupon proceeded from Oberhausen to Duisburg where at the seat of court there was examined the witness Emil Jahn, Chief clerk of the Royal Revenue Office at Duisburg, duly summoned. The witness was made acquainted with the subject matter of the investigation, his attention was called to the import of the oath, and he was thereupon examined as follows:

After being duly sworn: Deposition of Emil Jahn.

My name is Emil Jahn. I am 35 years old, belong to the evangelical confession and am not related to the accused either by blood or marriage.

As to the subject matter:

In addition to my deposition made yesterday I can testify from my own knowledge also to the following:

The Imperial stamp No. 38 with which the stock certificates were stamped which were presented by Terlinden to the Chief Revenue Office at Duisburg to be stamped is a stamp with which the No. 38 is only used by the Chief Revenue Office at Duisburg. Other offices have other numbers. On the 24th of August, 1900 Terlinden

62 presented 400 certificates each for one thousand marks, to be stamped. The certificates bore the serial numbers from 1800 to 2200 inclusive. The stamping was caused to be done and completed on the same day with the Imperial stamp No. 38 under my control. Further Terlinden presented on the 14th of September,

ition of Emil 1900 1300 stock certificates of the Gerhard Terlinden Stock company, each of one thousand marks to be stamped. These certificates bore the consecutive numbers 2201 to 3500. The stamping of the certificates with the Imperial Stamp No. 38 was also done and completed on the same day. The certificates were in both cases counted by me and found to be correct with the stated numbers. Besides the assistant who did the stamping with the machine under my control, was directed to give to me such certificates as did not correspond with the stated numbers or certificates bearing the same number and not to stamp them. It is therefore entirely excluded that the stock certificates bearing the same numbers were presented to us by Terlinden for stamping and were stamped by us. After the 14th of September, 1900, no stock certificates of the Gerhard Terlinden Stock Company were presented by Terlinden or by any other person to the Royal Revenue Office at Duisburg for stamping.

I do not know by whom the stock certificates presented to us were printed.

EMIL JAHN,
Chief Clerk of the Revenue Office.

The oath was administered to the witness in accordance with Par. 326 II of the code of criminal procedure.

For authentication:

DR. VYGEN,
Circuit Judge.
BERGERFURTH,
Clerk.

Duisburg, the 22nd day of Augsut, 1901.

In the penal matter against Gerhard Terlinden, factory director et al, this day appeared upon being duly summoned the following named witnesses:

n of 63 Dr. Julius Adolf Endemann of Hannover, Director of the
A. Hannoverian Bank.
ann.

The attention of the witness having been called to the import of the oath and having been made acquainted with the subject matter of the investigation the witness testified after being duly sworn as follows:

As to the person: My name is Dr. Julius Adolf Endemann, 36 years old. I belong to the evangelical confession, am not related to the accused by blood or marriage.

As to the subject matter: Between the accused Terlinden and the Hannoverian Bank there was concluded on the 15th of September,

Exhibits to Traverse

1900, Terlinden was on said day personally present at said Bank in Hannover, the following agreement:

The Hannoverian Bank granted to the accused Terlinden personally a loan of eight hundred thousand marks (800000). Terlinden on the other hand gave in pledge eight hundred certificates of stock of the Gerhard Terlinden Stock Company of the par value of 1000 Marks each. In carrying out this agreement we granted the loan and Terlinden sent us on the 18th day of September, 1900, eight hundred certificates of the Gerhard Terlinden Stock Co. of the par value of 1000 Marks each which we took into safe keeping. These certificates of stock bore the consecutive numbers 2701 to 3500. Of these certificates I herewith deliver one, namely 2901. This certificate reads as follows

G T.

Gerhard Terlinden Stock Company of Oberhausen.

Imperial Stamp Duty 38 Two per centum.	Stock certificate No. 2901. For one thousand Marks.

The holder of this certificate is interested to the amount of one thousand marks in the Gerhard Terlinden Stock Company, at
64 Oberhasen as shareholder with all the statutory rights and liabilities.

Oberhausen, Rhineland, in August 1900.

Entered in Stock Book
Folio 30.
signed: Barth.

Gerhard Terlinden Stock Co.
The Board of Control
signed Wintenberg.
The Board of Management
Signed Gerhard Terlinde

Marks 1000.00 Marks

(Printing Office Richard Kuehne, Oberhausen.)

We have had the stock certificates delivered to us by Terlinden uninterruptedly in our possession until this day.

There was then submitted to the witness the stock certificate bearing the like number 2901 and delivered this forenoon by the witness Schlauch, whereupon he deposed: Since the managers of the Disconto Gesellschaft in Berlin hold the same certificate with the same number, either the certificate No. 2901 which has been given to the managers of the Disconto Gesellschaft in pledge or the No. 2901 which has been given to the Hannoverian Bank in pledge is forged. Being now further advised from the deposition of the witness Schlauch that the managers of the Disconto Gesellschaft have received in pledge the stock certificates 2901 to 3300 of the Gerhard Terlinden Stock

Company in May of this year either said stock certificates or the certificates bearing the same numbers which are in pledge with us and which Terlinden gave in pledge before, namely, in September, 1900 are false. Indeed, all that which I have testified to with reference to the stock certificate 2109 applies to all the stock certificates which bear the serial numbers 2901 to 3300. I will add that all the certificates of stock of the Gerhard Terlinden Stock Co. in the possession of the Hannoverian Bank exactly correspond with the copy 2901 presented by me herewith, all bear the same circular eagle
65 stamp with the circumscription Imperial Stamp Duty 38 two per centum, as does also the certificate shown to me and presented by the witness Schlauch from the possession of the managers of the Discontogesellschaft. Berlin.

Read, approved, signed.

DR. ENDEMANN.

The oath was administered to the witness in accordance with Par. 328 2 of the Code of Criminal procedure.

(Signed) DR. VYGES,
Circuit Judge.
BERGERFURTH,
Clerk.

It is hereby certified that the foregoing copies of the record correspond with the original depositions on file herein.

Duisburg, 22nd of August, 1901.

LADWIG,
Clerk of the Royal Circuit Court.

(Seal of Royal Prussian Circuit Ct. at Duisburg.)

The foregoing signature of the Clerk of the Royal Circuit Court, Ladwig, is hereby authenticated.

Duisburg, 22nd of August, 1901.

THE PRESIDING JUDGE OF THE CIRCUIT COURT
By RICHL, *Associate Judge.*

(Seal of Royal Prussian Circuit Ct. at Duisburg.)

This signature is hereby authenticated.

Berlin the 29th of August, 1901.

THE MINISTER OF JUSTICE.
By LUCAS.

(Seal of Ministry.)

66 (Copy of depositions contains the photograph of a man.)

Upon the faith of the files in this investigation it is hereby certified that the adjoined likeness is that of the accused.

Duisburg, the 22nd of August, 1901.

THE EXAMINING JUDGE OF THE ROYAL CIRCUIT COURT,
DR. VYGEN, *Circuit Judge, acting.*

The foregoing signature of Dr. Vygen, Circuit Judge, appointed by bench order of the Royal Circuit Court at Duisburg, of the 5th of July, 1901 to take charge of the duties of the examining judge for the period of August 16th to 31st is hereby authenticated. Certificates.

Duisburg, August 22nd, 1901.

THE PRESIDING JUDGE OF THE CIRCUIT COURT,
By RIEHL, *Associate Judge, acting.*

(Seal of the Court.)

This signature is hereby authenticated,
Berlin the 29th of August,

THE MINISTER OF JUSTICE,
By LUCAS.

(Seal of Ministry.)

(Copy of depositions contain stamp in red ink with eagle and following legend: Imperial Stamp Duty, 38 two per centum.)

Upon the faith of the files and records in the matter of this investigation it is certified that annexed stamp imprint of which there remains five exactly similar executions among the files of this investigations, was before the witness Chief Revenue Clerk Emil Jahn at his examination at Duisburg on the 21st day of August, 1901 and also before the witness boss-painter Ludwig Schulte at his examination on
67 the 21st and 26th of August, 1901 at Duisburg, and that the depositions of said witnesses refer to the annexed stamp imprint.

Duisburg, the 27th of August, 1901.

THE EXAMINING JUDGE OF THE ROYAL CIRCUIT COURT, AT DUISBURG,
DR. VYGEN, *Circuit Judge, Acting.*

(Seal of Ct.)

The foregoing signature of Dr. Vygen, Circuit Judge, appointed by Bench Order of the Royal Circuit Court of the 5th of July, 1901 to take charge of the duties of the examining judge for the period of August 16th to 31st is hereby authenticated.

Duisburg, the 27th day of August, 1901.

THE PRESIDING JUDGE OF THE CIRCUIT COURT,
By UNGEWITTER, *Associate Judge, Acting.*

This signature is hereby authenticated.
Berlin the 29th of August, 1901.

THE MINISTER OF JUSTICE,
By LUCAS.

(Seal of Ministry.)

68 ROYAL CIRCUIT COURT.

Duisburg, 26th of August, 1901.

Present:

Circuit Judge Dr. Vygen as Examining Judge.

Bergerfurth, Clerk of Court.

In the penal matter against Gerhardt Terlinden, factory director, et al, for forgery of instruments, there appeared the following named witnesses. The witnesses being made acquainted with the subject matter of the investigation and the person of the accused, were separately and in the absence of the witnesses to be heard later, examined as follows; after they were referred to the import of the oath:

ation of Lud- Schulte.

1. Boss-painter Ludwig Schulte, after being duly sworn.

As to the person: My name is Ludwig Schulte. I am 31 years of age, evangelical, not related to the accused by blood or marriage.

As to the subject matter:

In March of this year Terlinden came one day to my workshop and asked me whether I had the eagle stamp ordered of me ready. I affirmed I had. He said I should make an imprint. I took the plate upon which I had made the stamp and made an imprint by placing the print between rollers of the press. When I pulled the piece of tissue paper from the press, Terlinden took it away from me, took a roller along and went into my office and there made with the roller a print of the stamp from the tissue paper upon a piece of white paper. This was the correct method. The color which was applied was the brownish printing color commonly used in the factory. After Terlinden had made the print, he expressed his satisfaction, saying: "This is very nice." The plate upon which the stamp was contained I had also meanwhile taken out of the press and taken it with me to the office where Terlinden made the print with the roller. The plate may have been twenty

69 centimeters long and ten centimeters broad. Terlinden on that March day of this year, right after he had made the test, took possession of the plate, placed it in his coat pocket and went away with it. The trial print he also took with him as well as the pattern from which I had prepared the stamp. This pattern corresponded exactly with the stamp imprint now shown me upon page 41 of the original depositions in the matter of the investigation against Terlinden now submitted to me. At my examination on the 21st of August of this year the same stamp imprint on said page 41 was before me. On the same occasion Terlinden told me I should now also make the proper color for it. About an hour

later he calle! again and asked whether the color was ready. I had a small sample ready. He took the same along and also a spatula and a roller. The spatula served the purpose of putting the color on the plate. About 14 days later at the behest of Kosbadt and Terlinden I again made color and at the wish of Terlinden made more. On that March day on which Terlinden took the plate away with him it had shortly before been finished. I have only seen two imprints of this stamp plate before namely that one which Terlinden made for himself on the day on which he took the plate along, and that one which at the behest of Terlinden I made to show Kosbadt how. Both stamp prints approached very closely to the stamp print shown me upon page 41 of the depositions, except as to this, that the first print made by Terlinden was brownish.

Deposition of Ludwig Schulte.

Read, approved, signed.

LUDWIG SCHULTE.

2 witness. Hardware dealer Schulte. After being duly sworn. Deposition of Heinrich Schulte

As to the person:

I am called dealer in hardware, and am not, as it is erroneously stated in my deposition of the 21st of August, 1901 dealer in
70 railroad supplies, Heinrich Schulte, I am 42 years of age, belong to the evangelical faith, not related to the accused by blood or marriage.

As to the subject matter: Upon the draft now submitted to me dated Oberhausen, the 29th of April, 1901 which reads as follows:

Face: M 330584

per.

Oberhausen, Rhineland, the 29th of April, 1901.

for M 9582.25

On the 30th of July a/c pay against this first of exchange to the order of Barmer Bank Verein Hinsberg Fischer & Co. the sum of Marks nine thousand five hundred eighty-two and 25 pfgs for value received and charge same to account as per advice.

To Mr. Hch. Schulte, Gerhard Terlinden Stock Co.,
Sterkrade sig. Kosbadt, ppa Muller

No 35805

Payable at Imperial Bank Branch Oberhausen, Rhineland.

(Across the end:)

First of Exchange. Gerhard Terlinden Stock Co., Oberhausen, Rhineland. Hch. Schulte.

sition of
einrich Schulte

(On back:) German Draft stamp five marks for more than 9000 to 10000 mks. April 29, 1901.

Contents received
Barmer Bank Verein
Hinsberg Fischer & Co.

Sig. NN NN
(Signatures illegible.)

The acceptance signature is not written by me. I recognize this plainly by the handwriting and can definitely assert that the acceptance signature is written by another person. From whose
71 hand the signature comes I do not know. I cannot say anything at all, and have no surmises in this regard. In March, 1901 I once called at Terlinden's and communicated with him personally. My wife did not want me to continue the draft intercourse with Terlinden any more. I therefore told Terlinden in March last I would sign no more drafts for him. Terlinden was not satisfied with this at all, he said to me: "Then will I put you on your head," with which he evidently meant to say that he would cause me serious embarrassment. But I persisted toward Terlinden in my refusal, whereupon Terlinden left me standing and went away. On the same day, however, at the instance of Kosbadt, I did accept twelve drafts because I feared Terlinden might be in earnest with his threats.

Read, approved, signed,

HCH. SCHULTE.

ition of
st Wentges

3 Witness. Ernst Wentges, former business manager of the Gerhard Terlinden Stock Company.

As to the Person:—

My name is Ernst Wentges, am 43 years old, a catholic, without interest in the subject matter.

As to the subject matter: With the Gerhard Terlinden Stock Company I had the book keeping in charge. At my entrance in the year 1899 Terlinden designated to me Schulte, Seven and Dietz, as such customers who had received large loans in cash and goods and whom drafts might be drawn as the demand required; that the accounts of these three were not kept in the general book-keepers office, but were kept in his private office and that whenever I drew drafts upon any one of these, then I should make a note of them and leave the same in his private office.

In this way I have drawn a whole row of drafts. These drafts

were then sent to the drawee for his acceptance. Thus I have sent especially drafts to Schulte and Seven. At the present moment
72 I remember no case in which Terlinden or Kosbadt gave me an acceptance from Schulte or Seven. It is possible, however, that this may have been done in isolated cases. What person placed the acceptance signatures upon the drafts of Schulte and Seven submitted to me I cannot tell. At the end of March or beginning of April, 1901 Terlinden told me personally that we should not draw on Schulte any more. This then was no longer done on the part of the book keeping force. The last one of the drafts drawn on the book-keeping force on Schulte was due, if I am not mistaken, on the 20th of June, 1901. They were mostly three month acceptances which were signed by Kesbadt and myself in the name of the Gerhard Terlinden Stock Company as drawer. These drafts always involved such as we gave to our good suppliers and not such as were given to any one of the banks.

Read, approved, signed.

ERNST WENTGES.

4 Witness, Seven hardware dealer.

After being duly sworn.

As to the person: My name is Wilhelm Seven, I am 44 years of age, of the evangelical confession, without interest in the subject matter.

As to the subject matter. The two draft acceptances of the 27th and 18th of April, 1901 for 26250 marks and 25912.45 marks respectively which are now submitted to me I did not sign as acceptor.

The two drafts read as follows:

1 A Face:

M. 30532

per

Oberhausen, Rhineland, 27th of April, 1901.

for M 26250.

On the 30th of July, 1901 pay against this first of exchange to the order of Barmer Bank Verein Hinsberg Fischer & Co. the sum of Marks twenty-six thousand two hundred and fifty for value received and place same to account as per advice.

To Mr. Wilhelm Seven
Essen on the Ruhr
Graben str 11 55

Gerhard Terlinden Stock Co.,
sig. Kosbadt ppa Mueller

No. 25802

(On the end:)

First of Exchange. Gerhard Terlinden Stock Co Oberhausen Rhineland. Wilh. Seven.

sition of Wilhelm Seven.

b on the back.
5 draft stamps of the total amount of 13,50 mks.
Contents received
Barmer Bank Verein
Hinsberg Fischer & Co.
sig NN NN
II a face:
per M. 128966
Oberhausen, Rhineland, the 18th of April, 1901.
For M/25912.45.

On the 21st of July, 1901 pay against this first of exchange to the order of Barmer Bank Verein Hinsberg Fischer & Co. the sum of marks twenty-five thousand nine hundred and twelve and 45 pfgs. for value received and charge same to our account as per advice.

Gerhard Terlinden Stock Company
sig. Kosbadt ppa. Mueller

To Mr. Wilhelm Seven
Essen on the Ruhr
Grabenstr. 11/15

Draft stamps for the amount of 13 marks
(On the end:)
First of Exchange. Gerhard Terlinden Stock Co. Oberhausen Rhineland. Wilh. Seven.
35666
b. back.
For us to the order of the Imperial Bank Branch Essen for value received.

Barmen the 10th of July 1801
Barmer Bank Verein
Hinsberg Fischer & Co.
sig NN NN
Paid
Imperial Bank Branch
Contents received
Barmer Bank Verein
Hinsberg Fischer & Co.
sig NN NN

That I did not write the two draft acceptances I not only derive from the fact that these two drafts do not appear upon my draft book, but more particularly I recognize from the handwriting that the acceptances do not come from my hand.

They are written by a different hand, by whom I do not know. When in the course of the last years it often happened that drafts which I had not accepted were sent to me for redemption I remon-

strated with Terlinden and forbade such a course. Once I wrote Terlinden, and the other time when I went to see him personally I met the accused Kosbadt. Kosbadt at that time admitted to me—this may have been the latter part of 1900—that he wrote my name. But this statement did not refer to the two drafts shown me to-day. That he had direction from Terlinden to do this Kosbadt did not say. I did not ask him about it either. I said expressly that I would not tolerate such a course. So far as I remember my letter to Terlinden remained unanswered. With reference to my representation as to the high draft amounts, Terlinden always made me feel easy personally. Deposition of Wilh. Im Seven.

Read, approved, signed.

WILH. SEVEN.

75 5th Witness Latwesen, director of the Barmer Bank Verein Hinsberg Fischer & Co.

After being duly sworn:

As to the person:

My name is Heinrich Latwesen. I am 37 years old, of evangelical religion, not related to the accused either by blood or marriage. Deposition of Heinrich Latwesen

As to the subject matter:

The original draft shown to me now, dated Oberhausen, the 18th of April, 1901, draft amount 25912.45 Marks, date of maturity July 21, 1901, acceptor Wilhelm Seven, was sent to the Barmer Bank Verein by letter of 22nd of April, 1901 from the Gerhard Terlinden Stock Company, for its credit together with the other drafts. The letter was signed Gerhard Terlinden Stock Co. ppa. Kosbadt Muller.

In the latter, order was at the same time given for the value of the draft in favor of the Gerhard Terlinden Stock Co. The two drafts now shown me dated Oberhausen the 27th of April, 1901 draft amount 26250 marks, date of maturity July 30 1901, acceptor Wilhelm Seven, and the draft dated Oberhausen the 29th of April, 1901, draft amount 9582.35 marks, date of maturity July 1st 1901 acceptor Hch. Schulte, were sent to the Barmer Bank Verein by letter of the Gerhard Terlinden Stock Company, signed ppa Kosbadt Mueller.

Also in this letter order was given concerning the draft amount. During the business connection with the Terlinden hundreds of drafts of the Gerhard Terlinden Stock Co. came to the Barmer Bank Verein. The same were so far as I remember always signed by the "procurist" (manager) also the running correspondence,

for instance the letters with which the drafts were sent, always bore the signature of the "procurist" only the confidential letters he signed himself.

76 The drafts went to protest and were not paid.

Read, approved, signed.

Deposition of Martin Muller.

6th Witness Mueller of Oberhausen, formerly procurist of the Gerhard Terlinden Stock Co.

Upon being duly sworn.

As to the person:—My name is Martin Mueller, I am 48 years old, of evangelical religion, not related to the accused either by blood or marriage.

As to the subject matter:

All the drafts which I took as drawer signed came from the private office of the accused Terlinden in which he worked together with Miss Barth. As often as I signed any drafts the acceptance was already upon it. Thus it was with the three drafts now shown to me dated Oberhausen, 13th of April, 1901, dated Oberhausen the 27th of April, 1901, dated Oberhausen the 29th of April, 1901. If, as I now hear, the acceptance signatures Seven and Schulte are forged upon these drafts, the forgery can only have been executed by Terlinden, by Miss Barth or by Kosbadt. For Kosbadt received the drafts which came from Terlinden's private office. Who executed the forgery I cannot assert as to either of the three drafts. Upon the signing of the drafts I also signed the letters with which they were sent to the Bank Verein to be credited. The signing of drafts and of those letters with which they were given to the banks were pretty much my sole function for which I was called to the business office. For I have technical functions to perform and do not work at the business above. The drafts came sent by

77 Miss Barth or Terlinden in a locked portfolio from the private office of Terlinden to the business office. Here the portfolios were opened by Kosbadt who had the key to them. I had no key to them. I cannot remember that I was ever present at the opening of such a portfolio in which drafts were contained. I paid no attention to the business manager of the concern. That the drafts came from upstairs out of the private office I know from the fact that Kosbadt whenever he had ordered me to appear at the office at an appointed hour, and I came but the drafts were not yet there, would say the drafts had not yet come down from the private office.

Read, approved, signed.

MULLER.

The administration of the oath to all the witnesses was done in accordance with Par. 328 II of the code of criminal procedure. Done as above. Certificates.

Signed Dr. VYGEN,
Circuit Judge.
BERGERFURTH,
Clerk.

It is here by certified that the foregoing copies of record of depositions correspond with the proceedings for the taking of evidence herein.

Duisburg the 27th of August, 1901.

LADWIG,
Circuit Court Assistant.

(Seal of Court)

The foregoing signature of Circuit Court Assistant Ladwig Clerk at the Royal Circuit Court is hereby authenticated.

THE PRESIDING JUDGE OF THE CIRCUIT COURT,
by UNGEWITTER, *Associate Circuit Judge.*

(Seal of court)

This signature is hereby authenticated.

Berlin the 29th of August, 1901.

MINISTER OF JUSTICE by
LUCAS.

(Seal of Ministry.)

78 Endorsed: U. S. District Court. In re Gerhart Terlinden. Traverse to Return. Filed Oct. 28, 1901. T. C. MacMillan, Clerk.

79 And afterwards, to wit, on the 29th day of October, A. D. 1901, the following order was had and entered of record in said cause before the Honorable Christian C. Kohlsaat, Judge, to wit: Order of Oct. 29, 1901, granting leave to file petition for writ of certiorari.

In re petition of
9377 Gerhard Terlinden
for a writ of habeas corpus.

On motion it is ordered by the Court that leave be and hereby is given said Gerhard Terlinden to file his petition herein by two o'lock to-day praying that a writ of certiorari issue to Mark A. Foote, United States Commissioner.

Petition for writ of certiorari, filed Oct. 29, 1901.

80 And afterwards, to wit, on the 29th day of October, A. D. 1901, there was filed in the Clerk's Office of said Court in the above entitled cause, a Petition for writ of Certiorari in aid; said Petition being in the words and figures following, to wit:

United States of America, }
Northern District of Illinois. } ss.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois:

In re Habeas Corpus, }
Gerhard Terlinden. }

To the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States for the Northern District of Illinois.

The petition for a writ of Certiorari.

The petition of Gerhard Terlinden for a writ of certiorari in aid of the writ of Habeas Corpus herein issued by this Court respectfully shows:

First: That there are on file before Mark A. Foote, Esquire, United States Commissioner, the original complaint and warrant upon which petitioner was apprehended, and also the amended complaint and new warrant upon which your petitioner was arrested after having been discharged from the arrest under the first warrant; that with said amended complaint filed with said commissioner on or about the twenty-sixth (26th) day of September, 1901, there were filed certain depositions of testimony taken within the jurisdiction of the German Empire, which said despositions likewise contained copies of various provisions of the German Criminal Code, which provisions it is alleged your petitioner has violated;

81 and furthermore said depositions also contained a copy of the original warrants issued by the Courts of the German Empire; that said depositions and said copies of the provisions of the German Criminal Code and the copy of said original warrant were specifically identified and referred to by said amended complaint filed as aforesaid.

Second. That your petitioner has alleged as one of the causes of the illegality of his restraint that the amended complaint in question does not allege an extraditable offense; that in order for this court to determine the sufficiency of the complaint as effecting the

jurisdiction of the Commissioner, it is necessary to have before this Court the provisions of the German Law filed as heretofore set forth in this petition, and also a copy of the original warrant issued by the Courts of the German Empire as heretofore alleged. Petition for writ of certiorari, filed Oct. 29, 1901.

Third. That in order for this court fully to determine the questions raised by your petitioner's petition herein as to whether there exists a treaty between the Government of the United States and the German Empire for the extradition of persons charged with the offense or offenses alleged in said warrant issued by the court of the German Empire, it is necessary for this court to have for its consideration the depositions, provisions of the German Criminal Code and copy of the original warrant issued by said German Court heretofore referred to.

Wherefore your petitioner prays that this Court may issue a writ of certiorari, ordering the said Mark A. Foote, Esquire, United States Commissioner, to certify to this court the records herein referred to and in his possession at the time the writ of Habeas Corpus herein was issued, to the end that this court may have in its possession said records which are necessary for a complete
82 understanding in determining the issues raised by the petition for a writ of Habeas Corpus herein.

GERHARD TERLINDEN,
Petitioner.

United States of America
Northern District of Illinois. } ss.

State of Illinois,
Cook County } ss.

Gerhard Terlinden being first duly sworn on oath deposes and says that he is the petitioner herein and has heard the foregoing petition read and understands the contents thereof; that the same is true.

GERHARD TERLINDEN.

Subscribed and sworn to before me this 29th day of October A. D. 1901.

T. C. MACMILLAN,
Clerk.

[SEAL]

Endorsed: 9377. In the District Court, Northern District of Illinois. In re. Gerhard Terlinder. Petition for a writ of Certiorari in aid. Filed by leave of Court Oct. 29, 1901, at o'clock P. M. T. C. MacMillan, Clerk. A. C. Umbreit and Albert W. May, Petitioners Attorneys.

ng on petition for writ of certiorari, Oct. and 31, 1901.

83 And afterwards, to wit, on the 29th day of October, A. D. 1901, the following order was had and entered of record in said cause before the Honorable Christian C. Kohlsaat, Judge, to wit:

In re petition of
9377 Gerhard Terlinden
for a writ of habeas corpus

On reading and consideration of the petition this day filed herein by leave of Court praying for a writ of certiorari and after arguments of counsel the Court not being sufficiently advised in the premises takes this matter under advisement.

84 And afterwards, to wit, on the 31st day of October, A. D. 1901, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

In re petition of
9377. Gerhard Tarlinden,
for a writ of habeas corpus.

This matter coming on again to be heard come the parties by their Attorneys and the relator in custody of the Marshal and the Court having considered and being now fully advised in the premises denies the petition of said Gerhard Terlinden for a writ of certiorari herein. It is further—

Ordered by the Court that the question of whether since the formation of the German Empire the extradition treaty concluded between the Government of the United States and the Kingdom of Prussia in 1852 is still in force or abrogated by constitution of the German Empire, be submitted to the Court on briefs to be filed by the relator on November 2, 1901 at ten o'clock A. M. and reply brief by Monday, November 4, 1901 at ten o'clock A. M., and the further hearing of this matter is continued until Tuesday, Nov. 5, at ten o'clock A. M. It is further Ordered that said relator be remanded to the custody of the Marshal and that the motion to stay all further proceedings before the United States Commissioner be and the same hereby is denied.

85 And afterwards, to wit, on the 5th day of November, A. D. 1901, the following order was had and entered of record in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit:

Order of Nov. 5, 1901, denying writ and remanding petitioner to custody

In re. petition of
9377. Gerhard Terlinden,
for a writ of habeas corpus.

This cause coming on to be heard on the petition filed herein the return of the Marshal to the writ of habeas corpus and the traverse of the relator comes the petitioner by Albert W. May Esq. his attorney and in custody of the Marshal and comes also John C. Ames, the Marshal for this District, the respondent herein by William Vocke, Esq., his attorney. Thereupon the Court having heard the arguments of counsel for the petitioner and for said respondent and being fully advised in the premises, finds that said petitioner is lawfully restrained from his liberty. It is thereupon Ordered, Adjudged and Decreed by the Court that the petition in this cause be and the same hereby is dismissed and that said petitioner Gerhard Terlinden be and he hereby is remanded to the custody of said Marshal and that said petitioner pay the costs of this proceeding to which ruling of the Court said petitioner by his counsel duly excepts, and on his motion for an appeal from said ruling it is Ordered by the Court that the amount of the appeal bond herein be and the same hereby is fixed at the sum of five hundred dollars.

Appeal bond, filed Nov. 6, 1901.

86 And afterwards, to wit on the 6th day of November, A. D. 1901, there was filed in the Clerk's Office of said Court in the above entitled cause, a Bond in Appeal; said Bond being in the words and figures following, to wit:

87 Know all Men by these Presents, That we, Gerhard Terlinden as principal and The American Bonding and Trust Company of Baltimore City, a corporation existing under the laws of the State of Maryland with offices in Chicago, as sureties, are held and firmly bound unto John C. Ames, United States Marshal, Northern District of Illinois, in the full and just sum of five hundred dollars to be paid to the said John C. Ames, United States Marshal, Northern District of Illinois, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 5th day of November in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a regular term of said court in a suit depending in said court, between Gerhard Terlinden and John C. Ames,

Appeal bond, filed Nov. 6, 1901.

United States Marshal, Northern District of Illinois, a judgment was rendered against the said Gerhard Terlinden denying his application for discharge from imprisonment and discharging the writ of habeas corpus and the said Gerhard Terlinden having obtained an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said John C. Ames, United States Marshal, Northern District of Illinois, citing and admonishing him to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within 30 days from the date hereof.

Now, the condition of the above obligation is such, That if the said Gerhard Terlinden shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GERHARD TERLINDEN. [SEAL]
THE AMERICAN BONDING AND TRUST COMPANY OF BARTIMORE CITY. [SEAL]
[SEAL] By FREDERICK A. BROWN, *Pres.* [SEAL]
Attest:
COLEY M. HAVEN,
Asst. Secty.
Sealed and delivered in presence of:
H. C. SHUTE.
Approved Nov. 5, 1901.
KOHLSAAT, J.

State of Illinois, } ss.
Cook County }

Before me Will T. Davies a Notary Public in and for said county and state aforesaid, appeared Gerhard Terlinden and being by me first duly sworn deposes and says that he signed, sealed and acknowledges this bond for the uses and purposes therein set forth.

GERHARD TERLINDEN.

Subscribed and sworn to before me this 5th day of November, A. D. 1901.

WILL T. DAVIES,
Notary Public.
[SEAL]

(Indorsed) Filed Nov. 6, 1901, at —— o'clock —— m. T. C. MacMillen, Clerk.

88 And afterwards, to wit, on the 6th day of November, A. D. 1901, there was filed in the Clerk's office of said Court in the above entitled cause, a Prayer for Appeal and Assignment of Errors; said Prayer for Appeal and Assignment of Errors being in the words and figures following, to wit:

Petition for appeal, filed Nov. 6, 1901.

United States of America, }
Northern District of Illinois. }

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In re Habeas Corpus. }
Gerhard Terlinden. }

To the Honorable Christian C. Kohlsaat, Judge of said Court.

The defendant, Gerhard Terlinden herein above named conceives himself grieved by the judgment of this Court made on the 5th day of November A. D. 1901 discharging the writ of habeas corpus heretofore issued and hereby appeals from said order and judgment of this Court to the United States Circuit Court of Appeals for the 7th Circuit, and states that his reasons for said appeal are specified in the assignment of errors filed herewith, and therefore prays that his appeal may be allowed and that the transcript of the record and of the proceedings and papers upon which said order and judgment were founded after due authentication may be sent to the said United States Circuit Court of Appeals for the 7th Circuit. Dated this 6th day of November, A. D. 1901.

A. C. UMBREIT,
ALBERT W. MAY,
Attorneys for Gerhard Terlinden.

ment of er- Filed Nov. 901

89 United States of America, }
Northern District of Illinois. }

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In re. Habeas Corpus, }
Gerhard Terlinden. }

To the Honorable Christian C. Kohlsaat, Judge of said Court.

Now on this 6th day of November, A. D. 1901, comes the said Gerhard Terlinden by A. C. Umbreit and Albert W. May his attorneys and says: that the order and judgment in his said cause is erroneous and against the just rights of him, the said defendant and assigns the following reasons therefor:

Specification 1. That the Court erred in declining to hold that no treaty exists between the United States of America on the one part and the Kingdom of Prussia or the German Empire, on the other.

Specification 2. That the Court erred in holding that the question of the existence of a treaty must be determined by the political department of our government and was not within the province of the Court to decide.

Specification 3. That the Court erred in discharging the writ of habeas Corpus thereby holding the existence of a treaty between the United States of America on the one part, and the Kingdom of Prussia or the German Empire on the other part.

Specification 4. That the Court erred in denying the right to introduce evidence for the purpose of showing that no extraditable offence has been committed.

90 Specification 5. That the Court erred in denying a prayer for a writ of certiorari in aid of the writ of Habeas Corpus heretofore issued, to bring the record from the United States Commissioner to the District Court aforesaid.

Specification 6. That the Court erred in holding that the record before this Court shows the commission of an extraditable offense.

Wherefore the said Gerhard Terlinden prays that the said judgment and order may be reversed and that the said District Court may be directed to enter an order or decree in favor of the defendant in accordance with prayer of the petition for Habeas Corpus in this cause filed.

A. C. UMBREIT per M.
ALBERT W. MAY,
Attorneys for Gerhard Terlinden.

Endorsed: 9377. United States District Court, Northern District. In re. Gerhard Terlinden vs. John C. Ames, Marshal. Prayer for appeal and Assignment of Errors. Filed Nov. 6, 1901, at 10 o'clock A. M. T. C. MacMillan, Clerk.

91 And afterwards, to wit, on the 6th day of November, A. D. 1901, the following order was had and entered of record, in said cause, before the Hon. Christian C. Kohlsaat, Judge, to wit: Order of Nov. 6, 1901, allowing appeal.

In re. Petition of
9377 Gerhard Terlinden,
for a writ of habeas corpus

On motion of said petitioner supported by his petition this day filed herein for an appeal to the United States Court of Appeals for this Circuit and it appearing to the Court that said petitioner has filed his assignment of errors together with an Appeal Bond in the sum of five hundred dollars.

It is Ordered that said appeal be and the same hereby is allowed and said petitioner has ten days in which to prepare and file his bill of exceptions herein. It is further ordered by the Court that Frederick Struckmeyer be and hereby is appointed to serve the Citation herein on John C. Ames, the respondent herein.

92 IN THE DISTRICT COURT OF THE UNITED STATES Clerk's certificate

For the Northern District of Illinois

Northern Division

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record and proceedings in Case No. 9377, In re Gerhard Terlinden for a writ of Habeas Corpus, as the same appears from the records and files now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago in said District, this 8th day of November, A. D. 1901.

T. C. MACMILLAN,
Clerk.

[SEAL.]

. filed
7, 1901.

93 And afterwards, to wit, on the 6th day of November, A. D. 1901, there was issued out of and under the seal of said Court, in said cause, a Citation; which said Citation is in the words and figures following, to wit:

94 United States of America, } ss.

The President of the United States, To John C. Ames, United States Marshal for the Northern District of Illinois. Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the 7th Circuit, to be holden at Chicago within thirty days from the date hereof, pursuant to an appeal wherein Gerhard Terlinden is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat, Judge of the District Court of the United States, this 6th day of November in the year of our Lord one thousand nine hundrd one.

KOHLSAAT, J.

Rec'd copy of within Nov. 6, 1901.

JOHN C. AMES, *U. S. Marshal,*
By M. E. PATTERSEN, *Deputy.*

(Indorsed) Filed Nov. 7, 1901. T. C. MacMillan, Clerk,

95-98 And afterwards, to wit, on the 15th day of November, A. D. 1901, there was filed in the clerk's office of said court in the above-entitled cause, a petition for appeal and assignment of errors, which said petition for appeal and assignment of errors being in the words and figures following, to wit:

99 UNITED STATES OF AMERICA, }
Northern District of Illinois. }

In the District Court of the United States *of* the Northern District of Illinois.

In re Petition of *Habeas Corpus* of GERHARD TERLINDEN.

To the Honorable Christian C. Kohlsaat, judge of said court:

The petitioner, Gerhard Terlinden, herein above named conceives himself aggrieved by the judgement of this court made on the fifth (5th) day of November 1901, discharging the writ of *habeas corpus* heretofore issued and hereby appeals from said order and judgement of this court to the Supreme Court of the United States, and states that his reasons for said appeal to said court are, that the determination of the issue in this cause involves the validity, existence and construction of a certain treaty alleged by the respondent to be in existence between the United States of America on the one part, and the Kingdom of Prussia, or the Empire of Germany on the other part. Which said reasons for said appeal are more particularly specified in the assignment of errors heretofore filed in this court on the sixth (6th) day of November 1901, and again, herewith, with this petition filed.

And therefore, prays that his appeal to the United States Supreme Court may be allowed, and that the transcript of the record,
100 and of the proceedings and papers upon which said order and judgement were founded after due authentication may be sent to the Supreme Court of the United States.

Dated this 15th day of November in the year of our Lord 1901, and of the Independence of the United States one hundred and twenty-five.

A. C. UMBREIT,
Per M.,
ALBERT W. MAY,
Attorney- for said Gerhard Terlinden.

101 UNITED STATES OF AMERICA, }
Northern District of Illinois. }

In the District Court of the United States for the Northern District of Illinois.

In re Habeas Corpus, GERHARD TERLINDEN.

To the Honorable Christian C. Kohlsaat, judge of said court:

Now on this 15th day of November, A. D. 1901, comes the said Gerhard Terlinden by A. C. Umbreit and Albert W. May his attorneys and says: That the order and judgment in his said cause is erroneous and against the just rights of him, the said defendant and assigns the following reasons therefor:

Specification 1. That the court erred in declining to hold that no treaty exists between the United States of America on the one part and the Kingdom of Prussia or the German Empire, on the other.

Specification 2. That the court erred in holding that the question of the existence of a treaty must be determined by the political department of our Government and was not within the province of the court to decide.

Specification 3. That the court erred in discharging the writ of *habeas corpus* thereby holding the existence of a treaty between the United States of America on the one part, and the Kingdom of Prussia or the German Empire on the other part.

102 Specification 4. That the court erred in denying the right to introduce evidence for the purpose of showing that no extraditable offence has been committed.

Specification 5. That the court erred in denying a prayer for a writ of certiorari in aid of the writ of *habeas corpus* heretofore issued, to bring the record from the United States commissioner to the district court aforesaid.

Specification 6. That the court erred in holding that the record before this court shows the commission of an extraditable offense.

Wherefore, the said Gerhard Terlinden prays that the said judgment and order may be reversed and that the said district court may be directed to enter an order or decree in favor of the defendant in accordance with prayer of the petition for *habeas corpus* in this cause filed.

A. C. UMBREIT,
Per M.,
ALBERT W. MAY,
Attorneys for Gerhard Terlinden.

Endorsed: 9377. Gerhard Terlinden *vs.* John C. Ames, marshal for the northern district of Illinois. Petition for appeal to Supreme Court and assignment of errors. Filed Nov. 15, 1901 at 2 o'clock p. m. T. C. MacMillan, clerk.

103 And afterwards, to wit, on the 15th day of November, A. D. 1901, there was filed in the clerk's office of said court, in the above-entitled cause, a bond, which said bond is in the words and figures following, to wit:

104 Know all men by these presents that we, Gerhard Terlinden, as principal, and the American Bonding & Trust Company of Baltimore City and having offices in the city of Chicago, Illinois, as sureties, are held and firmly bound unto John C. Ames, United States marshall for the northern district of Illinois, in the full and just sum of five hundred dollars to be paid to the said John C. Ames, United States marshal for the northern district of Illinois — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of November in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a regular term of said court in a suit depending in said court, between Gerhard Terlinden and John C. Ames, United States marshal for the northern district of Illinois a judgment was rendered against the said Gerhard Terlinden denying his application for discharge from imprisonment and discharging the writ of *habeas corpus* and the said Gerhard Terlinden having obtained an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said John C. Ames, United States marshal for the northern district of Illinois citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said Gerhard Terlinden shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GERHARD TERLINDEN. [SEAL.]
THE AMERICAN BONDING AND TRUST CO. OF BALTIMORE CITY, [SEAL.]
By FREDERICK A. BROWN, [SEAL.]
Vice-Pres't.

Attest: ALPHR. J. POWERS, *Ass't Sec't'y.* [SEAL.]

Sealed and delivered in presence of—
ALBERT W. MAY.

Approved by—
KOHLSAAT, *J.*

Nov. 15, 1901.

We enter our consent to the approval of the foregoing bond.
WILLIAM VOCKE.
WILLIAM MANNHARDT.

105 STATE OF ILLINOIS, } *ss:*
Cook County, }

Before me, Will T. Davies, a notary public in and for the county and State aforesaid, this day appeared Gerhard Terlinden, and being by me first duly sworn, deposes and says that he signed, sealed and acknowledges this bond for the uses and purposes therein expressed.

GERHARD TERLINDEN.

Acknowledged, subscribed and sworn to before me this 14th day of November, A. D. 1901.

WILL T. DAVIES,
[SEAL.] *Notary Public.*

[Endorsed:] 9377. United States district court, northern dist. of Illinois, northern division. Gerhard Terlinden *vs.* John C. Ames, marshal. Bond. Filed Nov. 15, 1901 T. C. MacMillan, clerk.

106 And afterwards, to wit, on the 15th day of November, A. D. 1901, there was issued out of and under the seal of said court in the above-entitled cause, a citation; which said citation is in the words and figures following, to wit:

107 UNITED STATES OF AMERICA, *ss:*

To John C. Ames, United States marshal for the northern district of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an appeal wherein Gerhard Terlinden, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat judge of the district court of the United States this 15th day of November, in the year of our Lord one thousand nine hundred and one.

KOHLSAAT, *Judge.*

108 [Endorsed:] No. 9377. Supreme Court of the United States. Gerhard Terlinden *vs.* John C. Ames, marshal. Citation to the Supreme Court of the United States. Filed Nov. 18 1901 at — o'clock — m. T. C. MacMillan, clerk. Rec'd copy of within November 16, 1901. John C. Ames, U. S. marshal, by M. E. Patterson, deputy.

109 And afterwards, to wit, on the 15th day of November, A. D. 1901, the following order was had and entered of record, in said cause, before the Hon. Christian C. Kohlsaat, judge, to wit:

In re GERHARD TERLINDEN for a Writ of *Habeas Corpus.* 9377.

On motion of said petitioner supported by his petition this day filed herein for an appeal to the Supreme Court of the United States and it appearing to the court that said petitioner has filed his assignment of errors together with an appeal bond in the sum of five hundred dollars,

It is ordered that said appeal be and the same hereby, is allowed and—

It is further ordered by the court that Frederick Struckmeyer be and hereby is appointed to serve the citation on John C. Ames, the respondent herein.

110 In the District Court of the United States for the Northern District of Illinois, Northern Division.

I, T. C. MacMillan, clerk of the district court of the United States of America for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record and proceedings in case No. 9377, *In re* Gerhard Terlinden for a writ of *habeas corpus*, as the same appears from the records and files now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office at Chicago in said district, this 16th day of November, A. D. 1901.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN, *Clerk.*

Endorsed on cover: File No. 18,328. N. Illinois D. C. U. S. Term No. 475. Gerhard Terlinden, appellant, *vs.* John C. Ames, United States marshal for the northern district of Illinois. Filed November 25th, 1901.

Office Supreme Court U.S.
FILED
NOV 26 1901
JAMES H. McKENNEY,
Clerk

No. 475.

By. A. May for Appt. (on mo.)

UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Nov. 26, 1901.

No. 475.

GERHARD TERLINDEN, APPELLANT,

vs.

JOHN C. AMES, U. S. MARSHAL, ETC., APPELLEE.

MOTION CONCERNING CUSTODY OF APPELLANT PENDING APPEAL.

And now comes the said appellant, Gerhard Terlinden, by Albert W. May and A. C. Umbreit, his attorneys, and moves the court to enter an order directing the appellee to detain in his possession and custody the appellant, under section 2 of rule 34 of this court and under section 765 of the Revised Statutes of the United States.

And for cause of said motion the appellant respectfully shows:

First. That he is now imprisoned and restrained of his liberty by John C. Ames, the appellee, marshal of the

United States for the northern district of Illinois, in the Cook County jail, in the city of Chicago, Illinois.

Second. That appellant is thus imprisoned and held in custody under color of the authority of the Constitution and laws of the United States relating to the return of fugitives from justice to foreign countries with which the United States has concluded treaties of extradition.

Third. That said John C. Ames, the appellee, claims to hold in custody and in prison the appellant under and by virtue of a certain warrant issued by Mark A. Foote, United States commissioner for the northern district of Illinois; which warrant was issued under the following circumstances:

On the fifteenth (15th) day of August, 1901, a complaint of Walther Wever, imperial German consul at Chicago, was presented to said commissioner, praying that a warrant might issue against appellant for the apprehension and commitment of appellant, in order that the evidence of his criminality might be inquired into, and that appellant might be extradited and delivered up to the justice of the Kingdom of Prussia; whereupon the said commissioner issued his warrant, and appellant was apprehended in the city of Milwaukee on or about the sixteenth (16th) day of August, 1901, by said appellee, and was thereupon by said appellee taken before said commissioner, and from thence taken to the county jail of the county of Cook and State of Illinois, where appellant has ever since been confined; that at the instance and request of the attorney for said imperial German consul the hearings before the commissioner were

continued from time to time, the last continuance being to the twenty-sixth (26th) day of September, 1901.

Fourth. That on said twenty-sixth (26th) day of September, 1901, the proceedings before said commissioner were dismissed on motion of the attorney for the German consul, and appellant, while still in the presence of said commissioner, was again arrested on said twenty-sixth (26th) day of September, 1901, upon another warrant issued by said commissioner, which said second warrant was issued by said commissioner upon a second complaint filed before said commissioner by said imperial German consul; that the said second complaint was presented to said commissioner on or about the twenty-fifth (25th) day of September, 1901, and the hearing upon said second complaint was continued by said commissioner.

Fifth. That afterwards, on the sixteenth (16th) day of October, 1901, appellant filed in the office of the district court of the United States for the northern district of Illinois a petition for a writ of *habeas corpus;* which said petition, amongst other things, averred that said imprisonment was illegal and without authority in law and in violation of the Constitution and laws of the United States, for the following reasons:

1. No treaty or convention for the extradition of fugitives from justice exists between the United States and the German Empire.

2. That the treaty or convention for the extradition of fugitives from justice concluded between the United States

and the Kingdom of Prussia on the 16th day of June, 1852, and ratified May 3, A. D. 1853, was terminated by the creation of the German Empire and the adoption of the constitution of said Empire in A. D. 1871, and that no treaty or convention for the extradition of fugitives from justice has been concluded between the United States, on the one part, and the Kingdom of Prussia or the German Empire, on the other, since said time.

3. Said complaint does not charge an extraditable offense under the provisions of the treaty of 1852, concluded between the United States and Prussia and other German States, were said treaty still in force and binding effect.

4. That appellant is not guilty of any extraditable offense under the provisions of said treaty of 1852, were said treaty still in force and of binding effect.

5. All proceedings had or attempted to be had before said commissioner under said complaint and warrant are illegal, void, and without authority in law, because said commissioner did not have jurisdiction over the person of this appellant.

Sixth. That thereupon the usual writ of *habeas corpus* was issued by his honor Christian C. Kohlsaat, judge of said district court, returnable on the twenty-first (21st) day of October, 1901, at 10 o'clock a. m. of said day; and afterwards, on said twenty-first (21st) day of October, the hearing was continued by said district court to the twenty-eighth (28th) day of October, 1901; and on said twenty-eighth (28th) day of October, amongst other proceedings had in

said court in this case, the further hearing was continued to the twenty-ninth (29th) day of October; and on said twenty-ninth (29th) day of October, 1901, the further hearing on said petition was continued to the thirty-first (31st) day of October, 1901; and on said thirty-first (31st) day of October, 1901, the further hearing was continued to the fifth (5th) day of November, 1901; and on said fifth (5th) day of November, 1901, the said writ of *habeas corpus* was discharged by said district court and appellant remanded to the custody of the marshal under the warrant of commitment issued by said commissioner.

Seventh. That thereafter appellant prayed for and obtained and perfected an appeal from the action of the district court aforesaid to the United States circuit court of appeals for the seventh judicial circuit; that after appellant had filed the record, briefs, and abstract in said court of appeals the attorney for the imperial German consul, representing the marshal, the appellee here, moved in said court to dismiss the appeal upon the ground that said appeal involved the question of the validity and construction of a treaty of the United States of America; that thereafter, on the fourteenth (14th) day of November, 1901, the said circuit court of appeals rendered an opinion by Judge Jenkins, presiding, holding that the jurisdiction of the circuit court of appeals was doubtful, and the said court, not feeling disposed to assume a doubtful jurisdiction, and especially as the question raised was an important one and involving international obligations and relations which should be peculiarly within the province of the Supreme Court, decided that in order to preserve the rights of the appellant and with re-

spect to the motion the said court would hold it in abeyance with a view to permitting appellant to take his appeal to the Supreme Court of the United States from the ruling below, and to take such other steps as he might be obliged to in order to protect his rights.

Eighth. Appellant further respectfully represents that no order concerning his custody was entered by the district court aforesaid.

Ninth. Appellant further respectfully shows to this court that subsequent to the issuing of the writ of *habeas corpus* by the district court aforesaid and prior to the fifth (5th) day of November, 1901, aforesaid, and notwithstanding that appellant, during the pendency of said *habeas corpus* proceedings, was in custody of the said district court under the writ of *habeas corpus* aforesaid, the said commissioner proceeded upon various days to hear testimony and deposition and receive evidence concerning the criminality of appellant; and on the fourth (4th) day of November, before the said *habeas corpus* proceedings had been determined by the said district court, the said commissioner made his finding and report and certified the same to the honorable the Secretary of State, at Washington, finding that the several charges of which the appellant was accused by the said imperial German government had been sustained, and recommending that the warrant for appellant's extradition to the authorities of the Kingdom of Prussia be issued.

Tenth. Appellant is now informed by the appellee that, upon the finding and report of the commissioner above

mentioned, the Secretary has issued the warrant of extradition and has placed the same into the hands of the imperial embassy at Washington, and that appellee is prepared to deliver the appellant over to the representatives of the imperial German government, and now appellant fears and apprehends that he will be delivered up by the appellee to the said imperial German government, thereby rendering nugatory his successful prosecution of this appeal and ineffectual the final order of this court.

Wherefore appellant respectfully prays that this honorable court may issue an order directing the appellee aforesaid to detain in his possession and custody the appellant until the final decision of this cause by this honorable court.

GERHARD TERLINDEN,
By ALBERT W. MAY,
His Attorney.

A. C. UMBREIT AND
ALBERT W. MAY,
Attorneys for Appellant.

UNITED STATES OF AMERICA, *ss:*

IN THE SUPREME COURT OF THE UNITED STATES.

GERHARD TERLINDEN, *Appellant,*
vs.
JOHN C. AMES, *U. S. Marshal, etc., Appellee.*

To VOCKE & HEALY,
Attorneys for Appellee.

GENTLEMEN: Please take notice that on Monday, the twenty-fifth (25th) day of November, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, I shall present to the honorable the judges of said court, in the court-room usually occupied by them, at Washington, District of Columbia, a motion, a copy of which is herewith served upon you.

At which time and place you may appear if you see fit.

Yours,

A. C. UMBREIT AND
ALBERT W. MAY,
Attorneys for Appellant.

Received copy of above notice and copy November 22, 1901.

VOCKE & HEALY,
By WILLIAM MAUNHARDT.

No. 475.

By. of May & Doe for Appt.

Filed Dec. 28, 1901.

Office Supreme Court U.S.
FILED
DEC 28 1901
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 475.

GERHARD TERLINDEN, *Appellant,*

vs.

JOHN C. AMES, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS, *Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF FOR APPELLANT.

A. C. UMBREIT,
A. W. MAY,
ATTORNEYS FOR APPELLANT.

JOSEPH B. DOE,
OF COUNSEL.

BALLARD & BELLARD PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 478.

GERHARD TERLINDEN, *Appellant,*

vs.

JOHN C. AMES, United States Marshal for the Northern District of Illinois, *Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois.

Brief for Appellant.

STATEMENT OF THE CASE.

This is an appeal from the final judgment of the District Court for the Northern District of Illinois, dismissing the writ of *habeas corpus* and remanding appellant to the custody of the marshal for said district.

Appellant was arrested at the City of Milwaukee, Wisconsin, August 16, 1901, upon a warrant issued by Mark A. Foote, Esq., United States Commissioner, charging him with having committed within the jurisdiction of the German Empire, the crime of forgery. He was taken before said commissioner and the proceedings were then continued from time to time until the 26th day of September, 1901, when the original complaint and warrant were dismissed and appellant rearrested upon a new warrant, on substantially the same charge. The amended or new complaint, upon which this new war-

rant was predicated, besides detailed allegations of the alleged forgeries, contained copies of the warrant of arrest issued by the German court, of the provisions of the penal code of the German Empire applicable to the crimes charged and of all of the depositions of witnesses taken in said Empire in said matter, said copies being specifically referred to and described in said complaint and filed therewith, in effect as exhibits. The proceedings before said commissioner were again continued to the 16th day of October and on that day to the 28th day of October, 1901.

On the 18th day of October, 1901, appellant sued out a writ of *habeas corpus* on a petition alleging, in substance, that he was illegally restrained because no extradition treaty existed between the government of the United States and the German Empire, because the treaty of 1852 with Prussia and other German states was terminated by the formation of the German Empire; moreover, even if said treaty was not terminated, the complaint alleged no extraditable offense, and the testimony filed with said commissioner failed to show the commission of an extraditable offense, and the commissioner had no jurisdiction, under the provisions of the statutes and the treaty of 1852, if still in force, of the person of the appellant.

The writ was made returnable October 21, 1901, when the marshal filed his return, seeking to justify the detention under the warrant of commitment issued by the commissioner. To this return appellant filed his traverse, alleging facts material to the case and denying the justification under said commitment, attaching to said traverse and making the same a part thereof, copies of the depositions taken in Germany, of the pertinent provisions

of the criminal code of the German Empire and also of the civil code, these allegations showing, or tending to show, that appellant had committed no extraditable offense under any circumstances.

Appellant then asked leave to introduce testimony as to the legality of his restraint, and the court being in doubt as to whether such testimony could be received, directed counsel to submit briefs and continued the hearing to October 28, 1901. Briefs were submitted and on October 29th, the court declined to receive testimony and held that the question of the legality or illegality of appellant's detention must be determined from the records before the commissioner. Appellant then filed a petition for a writ of *certiorari* in aid of said writ of *habeas corpus*, for the purpose of bringing the record before the commissioner, before the court and on October 31st this petition was denied. The court then ordered counsel to file briefs on the questions raised by the petition for the writ of *habeas corpus* and took the matter under advisement until November 5, 1901, when the final judgment dismissing the writ and remanding appellant to the custody of the marshal, was entered.

From this final judgment appellant has prosecuted this appeal directly to this court because among the questions raised in his petition for the writ of *habeas corpus*, was included the question of the construction and validity of a treaty.

Specification of Errors.

Appellant assigns his specifications of errors committed by said District Court in thus dismissing his petition and remanding him to the custody of the marshal, as follows, in the order in which we intend to argue them:

First.

THAT THE COURT ERRED IN HOLDING THAT THE QUESTION OF THE EXISTENCE OF A TREATY MUST BE DETERMINED BY THE POLITICAL DEPARTMENT OF OUR GOVERNMENT AND WAS NOT WITHIN THE PROVINCE OF THE COURT TO DECIDE.

Second.

THAT THE COURT ERRED IN DECLINING TO HOLD THAT NO TREATY EXISTED BETWEEN THE UNITED STATES ON THE ONE PART AND THE KINGDOM OF PRUSSIA OR THE GERMAN EMPIRE ON THE OTHER.

Third.

THAT THE COURT ERRED IN DISCHARGING THE WRIT OF HABEAS CORPUS, THEREBY HOLDING THAT A TREATY OF EXTRADITION EXISTED BETWEEN THE UNITED STATES OF AMERICA ON THE ONE PART AND THE KINGDOM OF PRUSSIA OR THE GERMAN EMPIRE ON THE OTHER.

Fourth.

THAT THE COURT ERRED IN DECLINING TO HEAR EVIDENCE FOR THE PURPOSE OF SHOWING THAT NO EXTRADITABLE OFFENSE HAD BEEN COMMITTED.

Fifth.

THAT THE COURT ERRED IN DENYING THE PRAYER FOR A WRIT OF CERTIORARI IN AID OF SAID WRIT OF HABEAS CORPUS THERETOFORE ISSUED, FOR THE PURPOSE OF BRINGING THE RECORD FROM THE UNITED STATES COMMISSIONER TO THE DISTRICT COURT.

Sixth.

THAT THE COURT ERRED IN HOLDING THAT THE RECORD BEFORE THE COURT SHOWED THE COMMISSION OF AN EXTRADITABLE OFFENSE.

ARGUMENT.

MAY IT PLEASE THE COURT:

Before discussing the assignments of error just cited, we desire to invoke that principle of international law which holds that every person who comes into the territory of a nation immediately comes under its protection and partakes of the inviolability of the soil upon which he stands. He is no longer subject to the law of the country which he has left, nor can he be required to answer to it, except by the consent of the nation to whose laws he has made himself subject by coming within its territory.

Hawley International Extradition, 1.
Wharton Conflict of Laws, Section 17.

It has been held that aliens are entitled to the benefit of the fourteenth amendment of the Constitution of the United States.

In re Ah Tong, 3 Sawy. (U. S.), 144.
Ah Kow v. *Nunan*, 5 Sawy. (U. S.), 560.
In re Ah Ching, 2 Fed. Rep., 733.

It follows, therefore, that appellant cannot be removed from the territory of the United States, except by due process of law, that is, in accordance with the provisions of the extradition treaty, if one exists, and the statutes made and provided in relation thereto.

It can make no difference for what reason a person comes within the territory of a nation, when once there, he is entitled to its protection until good and legal cause is shown why such protection should be denied him.

First.

THE QUESTION OF THE CONSTRUCTION OR VALIDITY OF A TREATY IS A JUDICIAL QUESTION AND NOT A POLITICAL ONE.

The District Court held that it could not determine the question whether an extradition treaty existed, under the provision of which appellant might be extradited, because such question was exclusively within the province of the political department of the government to decide. We contend that this proposition is untenable. Section 2, Article III, of the Constitution of the United States, provides:

"The judicial power shall extend to all cases in law and in equity arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority."

Likewise, Section 8 of the act of March 3, 1891, which act created the Circuit Court of Appeals, provides that the proper judicial department of the government shall have power to determine the constitutionality of any law of the United States or the *validity or construction of any treaty made under its authority* WHEN DRAWN IN QUESTION. Thus the legislative department has clearly given the judiciary the power and jurisdiction to construe, and decide the validity of, treaties.

Those who helped frame our constitution and the early expounders of that instrument, held that the construction of a treaty was a judicial function. Thus:

> "The treaties of the United States, to have any force at all, must be considered as a part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determination."
>
> The Federalist, No. 22.

In a very early case a Circuit Court held that the validity of a treaty admitted of two descriptions, to wit: necessary validity and voluntary validity. By necessary validity of a treaty was meant those questions affecting the proper execution of a treaty, its purpose, construction and legal force and effect. By voluntary validity was meant those questions arising from the violations of the provisions of the treaty by one of the contracting parties, in which case the other contracting party could at its option, abrogate or annul the treaty, or enforce its provisions in the proper tribunal.

Jones v. *Walker*, 2 Paine's C. C. Rep., 688.
Wharton's International Law, Sec. 133.

Clearly, the necessary validity of a treaty is a question for the courts to determine while the voluntary validity is left for decision to the political department of the government.

It is true that political questions are pre-eminently the function of the political department of the government, and such questions when so determined are not otherwise decided by the courts.

Doe v. *Braden*, 16 How., 635.
Foster v. *Neilson*, 2 Peters, 314.

But the construction of treaties, including questions as to their validity and existence, is a question for the courts to determine.

Wilson v. *Wall*, 6 Wallace, 83.
U. S. v. *Rauscher*, 119 U. S., 407.
Benson v. *McMahon*, 127 U. S., 457.
In re Metzger, 1 Parker Crim. Rep., 108.

This court has time and again construed, interpreted and determined the validity of treaties. We cite some of the cases:

The Amicable Isabella, 6 Wheaton, 1.
The Nerida, 9 Cranch., 388.
Harcourt v. *Guillard*, 12 Wheaton, 523.
U. S. v. *Arredondo*, 6 Peters, 691.
City of New Orleans v. *Armas*, 9 Peters, 224.
The Amistad, 15 Peters, 518.
Storther v. *Lucas*, 12 Peters, 410.
U. S. v. *D'Auterive*, 10 Howard, 609.
Haucnstein v. *Lynham*, 100 U. S., 483.
U. S. v. *Rauscher*, 119 U. S., 407.

The question here urged upon the consideration of the court does not involve the principles of the abrogation of a treaty. We do not contend that the treaty in question was repealed or annulled by any positive act of either nation. Neither do we claim that either party has violated its provisions so that it might be considered abrogated at the option of the other party; but our contention is that the treaty in question has been dissolved, terminated by operation of law, in this case, by operation of international law. Since extradition treaties are personal executory contracts, as we shall show presently, it must follow that questions affecting the validity of those contracts and their existence under the law, are questions to be determined by the courts.

Furthermore, under the constitution treaties as well as the constitution and laws of the United States are the Supreme law of the land.

Art. VI, Constitution.

Consequently, treaties are on the same plane with provisions of the constitution and acts of Congress.

Whitney v. *Robertson*, 124 U. S., 190.
Botiller v. *Dominguez*, 130 U. S., 239.

Althought courts cannot pass on the policy of any legislative act, yet it is clearly within their function and power to determine, when such act is challenged, whether the law is a valid law, its meaning and effect and whether it has been repealed under certain circumstances. Likewise, in case of treaties, courts cannot determine what treaties are to be made and with whom they ought to be concluded, what are to be considered violations as between the parties thereto and what the remedy in case of violation by either party, but their construction and necessary validity and their termination or repeal under certain conditions, are questions of law, we submit, to be determined by the Courts of the land.

As already intimated, the question of the existence of the treaty under discussion, must be decided in accordance with the principles of international law. International law is a part of the law of the land and must be ascertained and administered by the courts whenever such questions are duly submitted to their determination.

Hilton v. *Guyot*, 159 U. S., 113.
The Paquette, Habana, 175 U. S., 677.

It has been held that acts of Congress ought to be construed with reference to the law of nations.

Murray v. *Schooner Charming Betsy*, 2 Cranch., 64.

If acts of Congress, why not treaties? The application of the principles of international law to determine the validity of a particular treaty, is the function of the judiciary.

Our contention on this branch of the case is respectfully submitted under the following propositions:

The construction, validity and existence of a treaty must be determined by the courts, because:

First. The duty is so imposed by the Constitution and acts of Congress.

Second. The courts have repeatedly done so, whenever called upon to act, on proper case presented.

Third. Treaties are part of the law of the land and are governed, in this respect, by the same rules that govern provisions of the Constitution and acts of Congress.

Fourth. The principles of international law must be applied in construing treaties, as well as other provisions of the law of the land and the question here raised must be determined by the application of those principles to the treaty under consideration.

Second and Third.

NO EXTRADITION TREATY EXISTS BETWEEN THE UNITED STATES AND THE DEMANDING COUNTRY UNDER THE PROVISIONS OF WHICH APPELLANT CAN BE SURRENDERED.

We shall discuss these two specifications of error together, because they involve the same question.

In seeking to establish our contention in this connection, we submit the following propositions to the consideration of this Court:

a.

A treaty must exist or appellant cannot be extradited under any circumstances.

b.

Extradition is an international act and is governed exclusively by the rules that obtain as to the conduct of nations in their intercourse with each other.

c.

The nature and characteristics of treaties generally and of extradition treaties in particular, are important considerations, in this connection.

d.

It is admitted that no extradition treaty exists between the United States and the German Empire.

e.

The present status of Prussia and the other German states is determined, to a great extent, by the Constitution of the German Empire.

f.

The present status of Prussia is finally determined by the principles of international law.

g.

The action of the United States in regard to other treaties with nations who lost their identity is instructive in this connection.

h.

The objections to our contention, when scrutinized and analyzed, will be found to be untenable both on principle and under the authorities.

i.

Even if the treaty of 1852 was not terminated, *ipso facto*, by the formation of the German Empire, yet extradition under its provisions is now legally impossible.

It must be admitted that the treaty relations between the United States and the German Empire, as far as extradition is concerned, are anomalous. No similar situation is presented in any other branch of our international intercourse. We contend that the continuance of this situation cannot be justified under any construction of international law and our own Constitution and statutes.

a.

The necessity of a treaty in order that extradition may be considered.

Our statutes provide that *"whenever there is a treaty or convention for extradition between the government of the United States and any foreign government,"* then certain judicial officers are authorized to entertain a complaint and issue a warrant to apprehend the alleged fugitive and examine into his criminality.

Section 5270, Revised Statutes.

This is a provision of the law of the land and the legislative branch of the government has determined that a treaty or convention for extradition shall exist before any demand for the surrender of an alleged fugitive can be considered at all.

There can be no extradition on principles of comity. Our government and our courts do not recognize such principle now. In the absence of a treaty, there is no law which authorizes the president to deliver up any one found in the United States, who is charged with having committed an offense against the laws of a foreign country.

Holmes v. *Jennison*, 14 Peters, 540.
Matter of Metzger, 5 Howard, 176.
U. S. v. *Rauscher*, 119 U. S., 407.
Wharton's Private Inter. Law, Sec. 835.
Wheaton's Int. Law (Boyd), Sec. 115.
Wharton's Int. Law Digest, Sec. 268.
Hawley International Extradition, 2

It is true that some authorities, both courts of other countries and writers on international law, hold that extradition should be granted as a matter of comity. But in the United States this doctrine has not been recognized and was denied in the first case of this kind that came to the attention of the court.

Republica v. *DeLongchamps*, 1 Dallas, 110.

The doctrine that without a treaty there can be no extradition has been steadily and uniformly maintained and the political department of our government has adopted the same policy.

Jefferson to Ghent, 1 Am. St. Pap., 177.
J. C. B. Davis to Delfosse, For. Rel., 1873.
Bayard to Davis, 1886, Mss. Dom. Let.
Cushing, Op. 85, 1853.

Consequently the existence of a treaty between this government and the demanding government must be es-

tablished or the extradition of appellant cannot even be considered.

b.

Extradition is an international act and can be consummated only between independent nations.

Extradition belongs exclusively to the foreign intercourse between sovereign nations and in such intercourse dependent states cannot be recognized. The treaty under which appellee seeks to justify the restraint of appellant is the treaty concluded with Prussia and other Germanic states in 1852, and in order to succeed in establishing such justification it must be shown not only that Prussia was an independent, sovereign nation at that time, but is such at this time, a governmental entity, recognized by international law as one of the family of nations. As we shall show presently, Prussia is now a dependent state, having none of the incidents of sovereignty, and has lost her identity as a nation.

> "Extradition of a fugitive from justice is essentially a national act. * * * Nations in their intercourse with one another do not recognize any local territorial divisions or deal with any authority except the supreme or sovereign government."
>
> Hawley International Extradition, 1.

Extradition is a proceeding by which one *sovereign* government whose laws have been violated by a person who thereafter flees from justice, demands, and the government to which he flees, surrenders, the fugitive to be tried for the offense.

> Anderson's Law Dict., 438.
> Bouvier's Law Dict., 637.
> Rapalje and Lawrence, Law Dict., 491.
> 1 Moore on Extradition, Section 1.

It has been held that "the rights and duties of nations towards each other relative to fugitives from justice, *are a part of the law of nations*, and have always been treated as such by the writers upon public law."

Chief Justice Taney in *Holmes* v. *Jennison*, 14 Peters, 569.

In a later case this court held that the power sought to be exercised by the governor of Vermont in seeking to surrender Holmes to a foreign nation, which power was discussed in the case just cited, "*is a part of the foreign intercourse of this country* which has undoubtedly been conferred upon the federal government, and it is clearly included in the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers."

U. S. v. *Rauscher*, 119 U. S., 407.

This doctrine that extradition is a matter of foreign intercourse between nations, has also been held by State Courts.

People v. *Curtis*, 50 N. Y., 326.
People v. *Supervisors*, 134 N. Y., 9.

From these authorities it is clear that the question of surrendering a fugitive can be considered only between powers that are sovereign and independent. If the demand in the case at bar is made by a state having no power to make treaties, appoint and receive ambassadors and other public ministers, or if the demand is made by a state having such powers but no treaty with this government on this subject, then extradition of appellant is impossible.

c.

The nature and characteristic of treaties generally and of extradition treaties in particular.

Text writers on international law, as well as our courts, have uniformly held that a treaty is nothing more than a contract between sovereign and independent states.

1 Kent's Com., 175.
Cherokee Nations v. *Georgia*, 5 Peters, 1.
Foster v. *Nielson*, 2 Peters, 253.
Davis v. *Concordia*, 9 How., 287.
The Head Money Cases, 112 U. S., 580.

Extradition treaties, of course, are included under the general principle that treaties are contracts. More than this, extradition treaties are executory contracts, calling for the personal service of the contracting nations in regard to certain specified matters that may occur in the future.

"General compacts between nations may be divided into what are called *transitory conventions* and *treaties*, properly so termed. The first are perpetual in their nature, so that being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties. Such are treaties of cession, boundary or exchange of territory, or those which create a permanent servitude in favor of one nation within the territory of another."

Wheaton's Int. Law (Boyd), Sec. 268.
Taylor's Int. Pub. Law (1901), p. 367.

"Treaties, properly so-called, or *Foedera*, are those of friendship and alliance, commerce and navigation, which, even if perpetual in terms, expire, of course," in certain cases.

Wheaton, *Idem*, Sec. 275.

"The second class may be called executory treaties because they stipulate for the performance of successive acts to be continued through a period of time, limited or unlimited. All such agreements as thus fall in the second class may be conveniently described with reference to their objects as treaties of alliance, neutrality, guarantee, commerce, *extradition*, and the like."

Taylor, *Idem*, p. 367.

Extradition treaties, therefore, belong to the class of treaties of friendship and alliance. Since these treaties are executory the continued existence of the contracting parties is necessary in order that the provisions of the compact be enforceable. The general rule that in cases of personal, executory contracts, death of one of the contracting parties terminates the contract is applicable to extradition treaties. A contract to render personal service is subject to the implied condition that the party shall be alive and able to perform it. Death or disability which renders the performance impossible, discharges the contract.

1 Beach on Contracts, 946.
1 Parsons on Contracts, 131.
1 Addison on Contracts, Sec. 396.
Maxwell v. *Phillips*, 162 Mass., 309.
Lorillard v. *Clyde*, 142 N. Y., 451.

Since a treaty is a contract made by one government with another government and deals with the foreign relations of the nation, not with its internal management or regulation of the conduct of its own subjects or citizens, and extradition treaties are executory contracts of friendship between the contracting nations, they can be maintained and their provisions enforced only between inde-

pendent and sovereign political entities. The continued existence of the contracting nations as treaty-making powers is absolutely necessary to the performance of the contract. Hence appellant can be extradited only on the condition that an independent, sovereign nation with whom the government of the United States has an extradition treaty has made a demand for his surrender. If the state, with whom a treaty may have existed, has lost its independence and sovereignty, can no longer make treaties with other nations, nor appoint or receive ambassadors and other public ministers, then its demand for the extradition of appellant cannot be honored, because extradition is an international act and extradition treaties are executory compacts which "expire, of course, in case either of the contracting parties loses its existence as an independent state."

Wheaton Int. Law (Boyd), Sec. 275.

d.

No extradition exists between the United States and the German Empire.

This will be admitted. The complaint filed with the commissioner shows that extradition here is attempted under the treaty with Prussia, concluded in 1852. In discussing the question as to what foreign nation is concerned in extraditing appellant, it will likewise have to be admitted that the sovereignty of the nation seeking the extradition is vested solely in the German Empire. The power of making treaties is vested solely in the sovereignty of independent nations, and it must therefore follow that, in order that extradition can be considered in this case at all, an extradition treaty ought to exist be-

tween the United States and the German Empire. If this does not exist, it would seem that the surrender of appellant is out of the question because though extradition is an international act, it cannot take place in accordance with the general provisions of comity, but must be provided for by a specific compact between independent nations.

If it should be claimed that by the formation of the German Empire in 1871, the treaties of the various component states became, *ipso facto*, the treaties of the empire, such proposition would be in violation of every known principle of international law, as well as untenable under the law of contract. Such a transfer of treaty obligations could certainly not take place without the consent of the other contracting party. These obligations are founded, not merely on the contract itself, but upon those mutual relations beween the contracting nations which may have induced them to enter into certain engagements.

Wheaton's International Law (Boyd), Sec. 29.

A transfer of these obligations, thus contracted, to a new nation without the consent of the other contracting party is impossible.

The treaty of 1852 never included all the states now component parts of the German empire. Nor were there separate treaties with all the German states. How could a fugitive be extradited in case he came from such a state and should now be found in the United States? Take the case of Alsace-Lorraine. We had an extradition treaty with France while these provinces formed a part of that nation. We never had one with them separately. If the formation of the German empire absorbed the

treaties of the component states and made them imperial treaties, then a stituation is presented in which a sovereign nation has concluded a treaty with another sovereign nation which, however, has no validity over the whole of its own territorial jurisdiction. Such an anomaly cannot exist under the principles of international law. We submit that the contention of such a transfer of treaty obligations due to the formation of the German Empire cannot be seriously urged. The fact remains that no extradition treaty between the United States and the German Empire, as a nation, exists.

e.

The present status of Prussia as determined by the provisions of the German Constitution.

A few historical facts in this connection are pertinent. From 1820 to 1866 there existed the German Confederation, composed of states which were recognized as separate entities, having power to conclude treaties, to receive and accredit ambassadors and other public ministers.

Wheaton's International Law (Boyd), Sec. 47, *et sq.*

This confederation was dissolved by the war with Austria in 1866. On the 14th day of June, 1866, Prussia, through a decree of the king, declared the confederation abrogated and no longer of binding effect. Thereafter the North German Union was created in 1867. This Union included all the German states, except the four southern states, to wit: Bavaria, Wuertemberg, Baden and Hesse.

The North German Union and the southern states

were united and formed the German Empire in 1871. When the German Empire was created, a constitution was adopted, the provisions of which are important in determining the present status of Prussia.

The internal sovereignty of a nation is determined by its municipal constitution. Its external sovereignty is to a large extent determined by the same instrument.

Wheaton's International Law (Boyd), Sec. 20.

The preamble of the German Constitution is as follows (Translation by Prof. Edward J. James):

"His Majesty, the King of Prussia, in the name of the North German Confederation, his Majesty, the King of Bavaria, etc., conclude an *eternal alliance* for the protection of the territory of the Confederation and of the laws of the same, as well as for the promotion of the welfare of the German people. This Confederation shall bear the name of the German Empire and adopts the following Constitution."

4 Convention Manual of the 6th New York Constitutional Convention, 1894, p. 265.

The words in the original translated as "an eternal *alliance*," are *"einen ewigen Bund,"* and the true import of these words, we submit, is *"an eternal union."* Be that as it may, German public jurists have held that the German Empire is a *Bundestaat* (compositive state), and not a *Staatenbund* (a system of confederated states).

Klueber, Secs. 103a, 176, 248, 260, 261, 462.
Heffter, das Europaishe Voelkerrecht, Sec. 21.

Within this confederate territory the Empire exercises the right of legislation according to the tenor of the

Constitution and with the effect that the Imperial Laws take precedence of the laws of the states.

> Art. II, German Constitution (Wheaton, Sec. 51 b.)

In the very next article is found a very significant provision, to wit:

> "In like manner those treaties shall remain in force which have been concluded between the various states of the confederation in relation to the custody of persons who are to be expelled, the care of sick and the burial of deceased citizens."
>
> Art. III, German Constitution (Hart Intro. Fed. Gov., p. 99, Sec. 83).

Nowhere else is any mention made of any other treaty theretofore made by any of the states as remaining in force for the present or any other time. Consequently, under the well known and uniformly recognized principle of law, "*expressio unius est exclusio alterius*," it is clear that the German Constitution did not attempt, by implication even, to adopt existing state treaties as imperial treaties.

By Article IV of said instrument are vested all affairs universally recognized as national affairs in the empire and imperial legislature.

The presidency of the Union belongs to the King of Prussia, who bears the name of German Emperor and who represents the empire *internationally*, declares war, makes peace, enters into treaties, accredits and receives ambassadors.

> Art. XI, German Constitution (Wheaton, Sec. 51 b; Hart Intro. Fed. Gov., p. 165.)

A common citizenship (indigenat) for all Germany was established to the effect that the subjects of each state are to be treated in every other state as natives, and are to have the right of becoming permanent residents, etc. As to foreign countries, every German is entited to the equal protection of the empire.

Art. III, German Constitution (Hart Intro. Fed. Gov., pp. 138-141).

It is unnecessary to cite other provisions of the German Constitution to show that Prussia has lost her identity as a nation. When Prussia became a part of the German Empire she lost her sovereignty and independence as a nation as completely as though she had become a part of Great Britain. By the adoption of the Constitution, Prussia surrendered to the empire her right of legislation on national affairs, to declare war, make peace, conclude treaties, receive and accredit ambassadors, and every other incident of sovereignty and independence as a nation. She specifically designated the emperor as her representative in international affairs. It will be admitted that Prussia now could not perform any of the above enumerated powers of sovereignty, including the power to make treaties. It will likewise be admitted that the United States could not now conclude an extradition treaty with Prussia. These admissions conclusively establish the fact that Prussia is not now independent and sovereign, but that her independence and sovereignty as a nation was merged in the German Empire.

f.

The present status of Prussia as determined by the principles of International Law.

The principles of international law finally determine the status of Prussia at the present time, and since the formation of the German Empire. From these principles it is absolutely established that Prussia has lost her identity as a nation and is no longer considered a sovereign state.

> "By a sovereign state, we mean a community or number of persons permanently organized under a sovereign government of their own, and by sovereign government we mean a government, however constituted, which exercises the power of making and enforcing law within a community, and it is not itself subject to any superior government. These two factors, one positive, the other negative, the exercise of power and the absence of superior control—compose the notion of sovereignty, and are essential to it." Prof. Montague, quoted in
>
> Wheaton International Law (Boyd), Sec. 33 a.

> "The sovereignty of a state consists in the right of independent action without reference to the will of any other state."
>
> Levy Int. Law, p. 81, No. 9, and p. 82, No. 10.

It is true that states may be either single or may be united together under a common sovereign prince or by a federal compact. If sovereign states are permanently united together by a federal compact so as to form a supreme federal government, it is then called a *compositive state*. This is the international status of the German Empire. "Germany has now become a *compositive* state, and the independence of its various members is merged in the sovereignty of the Empire, though the

respective heads of the several states retain their personal position as sovereigns."

Wheaton's International Law (Boyd), Sec. 51 b.

In determining what the principles of international law are on a given question, courts seek aid from the works of jurists and commentators.

Fremont v. *U. S.*, 17 Howard, 542.
Sears v. *The Scotia*, 14 Wallace, 170.
Hilton v. *Guyot*, 159 U. S., 113.

Prof. E. A. Freeman, professor of Modern History in the University of Oxford, in speaking of the German Constitution, says:

"If it does not answer the perfect federal idea, it at least comes so near to it that it would be mere pedantry to refuse it a place among federal systems."

Freeman's Historical Essays, 4th Series, p. 389.

This agrees with Wheaton's idea of a compositive state or supreme federal government as distinguished from a system of confederates states.

See, also,

Taylor's Int. Pub. Law, p. 123.

It will be contended that the German Empire is a mere alliance and that therefore the treaties of Prussia were not abrogated by entering this alliance. We have already shown that the German Constitution is something more than a mere treaty of alliance. Furthermore, general alliances, under the principles of international law, are limited to contracts between nations having in view co-

operation in cases of defensive or offensive wars, waged against or by the parties to the alliance.

> Wheaton's International Law (Boyd), Secs. 278, 280.
>
> Taylor's Int. Pub. Law, p. 370.

It may also be contended that because the King of Prussia was made the President of the Union under the name of German Emperor, therefore Prussia retained her sovereignty and is as independent now as she ever was. In reply to this contention we again quote from Prof. Freeman, who, in speaking of the position of the King of Prussia, says:

> "To translate from royal into republican language, it is as if the Governor of the State of New York should be ex-officio president of the United States."
>
> Freeman's Historical Essays, *supra.*

German public jurists likewise hold that all sovereignty and independence of the individual German states were merged in the empire. Thus, Prof. Philip Zorn, of the University of Koenigsberg, in speaking of the German Constitution, says:

> "The kernel of the constitutional organization of the Empire is that the empire can constitutionally enlarge its powers without limitation, apart from the 'reserved rights,' and that the individual states must obey an imperial law of this nature like any other imperial law. Thus, the sovereignty and nature of the German Imperial State is established by evidence which admits not the slightest doubt. Every deduction which contests this point lacks logical foundation."
>
> Annals-Amer. Academy of Political Science, July-Nov. 14, p. 78.

Again, the same authority says:

"A number of the states were up to that time (the formation of the German Empire) legally unconnected, independent, sovereign; they now enter, as in a corporation, a combination which has the character of a unit, so that the single members become legally dependent, while the unit only is independent and sovereign."

Annals, *supra.*

He then makes the statement that all great jurists and writers in Germany, such as Leband, Hanel and G. Meyer agree with the statement we have just quoted.

This theory that the German Empire is a mere alliance of independent states may be founded upon the idea of government which found expression in the Articles of Confederation under which the Colonies sought to establish a government after the Declaration of Independence. Although Art. II of this instrument expressly provided that each state retained its sovereignty and the preamble stated that the confederation was a "firm league of friendship" merely, yet the separate states were never recognized by the nations of the world as one of their numbers.

Van Holst, Const. Hist. U. S., p. 24.
King, Elliott's Debates, V, p. 212.

Therefore, if the German Empire be a mere loose confederation, an alliance, if you please, yet the separate states have never been recognized by the nations of the world as independent and sovereign. Under all the authorities, however, this Empire is something more than an alliance between independent states; it is a unit, representing the sovereignty of the German people in the family of nations, one compositive and independent state.

Courts take judicial notice of the existence of a sovereign power.

Jones v. *U. S.*, 137 U. S., 202.

The United States having recognized the internal and external sovereignty of the German Empire as distinct from its states, is bound thereby.

U. S. v. *Wagner*, 2 App. Cas., L. R., 624.

Such being the nature and characteristic of the German Empire under the principles of the law of nations, the treaties, properly so termed, of the separate states with foreign nations were terminated by the formation of that Empire.

That the political department of our government, that is, the executive and legislative branches, have recognized the German Empire as the sovereignty now existing over the territory formerly composing the Germanic States, is conceded. Such recognition is binding upon the courts.

Gelston v. *Hoyt*, 3 Wheaton, 246.
U. S. v. *Yorba*, 1 Wallace, 412.
U. S. v. *Lynde*, 11 Wallace, 632.

Over the same territory, however, only one sovereignty can exist. When such sovereignty is once recognized and established, it excludes every other.

Wharton's International Law Digest, Sec. 1.
Church v. *Hubbard*, 2 Cranch., 187.
Schooner Exchange v. *McFadden*, 7 Cranch., 137.

The territory now included within the Kingdom of Prussia is represented in international affairs by the German Empire. Consequenty, in such affairs said Kingdom

can exercise none of the incidents, functions or duties of sovereignty. If it could, there would then exist two co-ordinate sovereignties over the same territory, a condition not only not recognized by the law of nations, but specifically denied.

Taylor's Int. Pub. Law, pp. 170, 173, 174.

Prussia has been merged in the German Empire and has, therefore, disappeared as a nation.

> "Single commonwealths may also disappear by being merged in federal unions which assume the entire control of their international affairs."

Taylor, *Idem*, p. 201.

It is true that when an entire state loses its identity by being absorbed into another the treaty obligations of the absorbing state are extended to the one absorbed.

Taylor, *Idem, supra.*

But in the case at bar, as far as the treaty of 1852 is concerned, the very reverse of this proposition is urged. Such contention is untenable.

The general principle of International Law applicable to this situation is as follows:

> "The obligations of treaties, even where some of their stipulations are in their terms perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things."

Halleck's International Law, Ed. 1866, Sec. 8, p. 370.

Vattell Int. Law, Ed. Chitty, 1872, p. 312, Sec. 203.

Wildman International Law, V. 1, Ch. 4, Sec. 174.

Wheaton's International Law, Sec. 29.

> "Treaties, properly so-called, or *foedera*, are those of friendship and alliance, commerce and navigation, which, even if perpetual in terms, expire, of course;—I. In case either of the contracting parties loses its existence as an independent state."
>
> Wheaton's International Law (Boyd), Sec. 275.

As we have already shown, extradition treaties are treaties of friendship and consequently they expire if either contracting party loses its existence as an independent nation.

We respectfully submit that under the provisions of the German Constitution and International Law, Prussia lost her identity as a nation and ceased to exist as an independent state and consequently the treaty of 1852 between the United States and Prussia terminated, expired. The principles of International Law we have cited are conclusive on this proposition.

g.

The action of the political department of the Government as to other terminating treaties.

The political department of the government in this connection must be understood to mean the executive and legislative department as distinguished from the judicial department.

It is a significant fact that, although the United States had treaties or consular conventions with most of the German states, immediately after the formation of the German Empire, a consular convention was concluded with that Empire. (December 11, 1871.) It is contended that the present Empire is a no closer union than the old German Confederation, and therefore the extradition treaty with the separate states is still in force. If that is

so, why was it necessary to conclude a new consular treaty, a treaty of friendship the same as extradition treaties are, with the German Empire? If a new consular treaty with the empire was a necessity, why was not a new extradition treaty with the same nation a necessity in order that fugitives from justice might be extradited? The consular treaty referred to is found on page 363 of

Treaties and Conventions of the U. S. (1889).

We have already called attention to the fact that the German Confederation, existing from 1820 to 1866, was dissolved in the latter year on account of the war with Austria. Wuertemberg acceded to the treaty of 1852 with Prussia by a declaration dated October 13, 1853.

Treaties of the United States, 1146 (1889).

After the dissolution of the German Confederation with the members of which the treaty of 1852 was concluded, our own government, as well as that of Wuertemberg, considered this collapse of the German Confederation as terminating this treaty, because in 1868 a new treaty was made between these two nations, including the following article:

> "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between Wuertemberg and the United States on the 16th day of June, 1852, 13th day of October, 1853, remains in force without change."

Art. III, Treaty of 1868 with Wuertemberg.

Why the necessity of reviving this treaty, after the dissolution of the German Confederation in 1866, if the treaty was not affected or terminated by that event? Wuertemberg continued an independent nation, yet the two governments treated that convention as terminated until revived.

Again, as already stated, the North German Union was formed in 1867, and most of the states in that union had acceded to the treaty of 1852. The treaty of 1852 finally included twenty-seven German states and the North German Union included twenty-one of these states. If the treaty of 1852 was not terminated by the formation of the German Empire in 1871, why was it necessary upon the formation of the North German Union, including practically the same states that had concluded the treaty in 1852, to renew the provision for the extradition of fugitives by a new treaty in 1868, as was done? We quote:

> "The convention for the mutual delivery of criminals, fugitives from justice in certain cases, concluded between the United States on the one part and Prussia and other states of Germany on the other part, the 16th day of June, 1852, is hereby extended to all states of the North German Confederation."
>
> Art. III, Treaty of 1868, with North German Union.

It may be suggested that this provision in this treaty was included because new states were included, states with whom theretofore no extradition treaty had been concluded. The same is true in the case of the German Empire and the same necessity for an extension of the extradition provision existed in the latter case as in the former, and even more so because the Empire exists as a national unit while the North German Confederation was a league between twenty-three independent units.

Our government has considered a large number of other treaties concluded with nations that were afterwards absorbed by another nation, as terminated by such absorption. Thus the treaty with Algiers was terminated

in 1831 because French jurisdiction was extended by conquest over that nation. The Central American treaties of December 5, 1825, were terminated by the dissolution of the federation in 1839. All treaties with Hanover were terminated in consequence of its incorporation into the Kingdom of Prussia in 1866. The same is true as to treaties with Nassau on account of its absorption into the same Kingdom in 1846. The treaties with Sardinia and the two Sicilies were terminated by their absorption into the Kingdom of Italy. The treaty with the United Provinces of Netherlands, dated 1782, was considered terminated because the Netherlands became a part of France and then a part of Holland and finally a new Kingdom was formed, called the Kingdom of the Netherlands.

Wharton's Digest, Sec. 137a.

Thus even the political department of our government has considered a large number of other treaties as terminated when the sovereignty of the nation with which treaties had been concluded was destroyed by its absorption into another sovereignty.

If the political department of the government has treated the convention of 1852 as still of binding force and effect, it is apparent from the examples of other terminated treaties we have just cited, that the action of said department has not been consistent, and can therefore not be considered as a guide for the courts. We submit that the question whether the treaty of 1852 with Prussia was terminated or not is now before this Court as an original proposition, to be decided according to the principles of international law applicable to the facts and circumstances of the case.

h.

Objections to our contention considered.

In considering the objections that have been and may be raised to our contention that the treaty of 1852 was terminated by the formation of the German Empire, we meet first of all the opinion of Judge Blatchford in the case of *In re* Thomas, 12 Blatch., 379. The point was raised in that case that the extradition treaty with Bavaria concluded in 1853 was abrogated by the adoption of the German Constitution, but it was held that a treaty could not be abrogated by the action of Bavaria alone without the consent of the United States. The court apparently proceeded upon the theory that the question of the existence of the treaty in question came within the scope of what was called "voluntary validity" in *Jones* v. *Walker, supra,* but not within the doctrine of "necessary validity." As we have already shown, the question of the "voluntary validity" is not raised by our contention, but that of "necessary validity" is, a question of law to be decided by the courts. It does not appear that the principles of International Law which we have cited were invoked in the Thomas case. Furthermore, this case was decided in 1874, when the Empire had scarcely been organized and jurists had not as yet studied its nature and characteristics. Since that time specialists have given this peculiar form of government careful and industrious attention, and their conclusions we have already cited. We respectfully submit that the doctrine in the Thomas case is inapplicable to the questions raised by our contention in the case at bar.

The Illinois cases relied on (*Wunderle* v. *Wunderle,* 144 Ill., 59, and *Scharpf* v. *Schmidt,* 172 Ill., 255), con-

sidered transitory treaties, that is, those which act once for all and under which private individuals secure vested rights, and it was held that the formation of the German Empire did not abrogate these treaties. We have already cited authorities on International Law to the same effect that vested rights secured by individuals under treaty provisions are not affected by the disappearance of the treaty-making power of one of the contracting nations. But the treaty in question is not a transitory treaty, but a treaty of friendship, which, according to Wheaton (Sec. 275), expires of course in case either party loses its existence as an independent state. Consequently these cases are inapplicable to the case at bar and have no persuasive force in determining the question now presented.

Then we have been told that the two governments have for thirty years reciprocally extradited fugitives under the old treaty. This suggestion must be based on the old doctrine "whatever is, is right," and "whatever has been done, always must be done." Such a doctrine can not be countenanced by our courts. It may be contended that such action on the part of the two nations has placed a practical construction upon the situation and made the old contract between the United States and Prussia a living contract between the United States and the German Empire. This contention admits the principle that extradition is an international act, and this principle must be recognized since it has been so declared by all the authorities. But how could our contract with Prussia become a contract with the German Empire? Did the Empire absorb the contracts of its component parts and did a contract of a part become a contract of the whole without the express consent of the other contracting party? If the German Empire is merely a confederation and part-

nership, did the compact of one of the partners theretofore made become a compact of the whole partnership, especially when the partnership agreement (constitution) was not merely silent on this question, but specifically vested the making of all compacts in the official head of the confederation?

As we have already shown, extradition treaties are executory contracts, calling for the personal service, as it were, of the contracting nations. This contention of the appellee we are now considering must be based on the proposition that the compact in question was assigned or transferred by Prussia to the German Empire when the latter was created. That a contract, executory in its nature and calling for the personal service of one of the contracting parties, cannot be assigned without the express consent of the other contracting party, is well settled by the authorities.

Smelting Co. v. *Mining Co.*, 127 U. S., 379.
Delaware County v. *Safe & Lock Co.*, 133 U. S., 473.

For the same reason the doctrine of *novation* of the compact cannot be successfully invoked.

Boston Ice Co. v. *Potter*, 123 Mass., 28.
Spycher v. *Warner*, 74 Wis., 456.

That a transfer of treaty obligations from Prussia to the German Empire cannot be established by the conduct of the two now existing nations as to the treaty of 1852, we shall show in discussing the following objection.

It will be urged that our position with reference to the treaty of 1852 is untenable because the foreign departments of both nations have taken affirmative action to

extend said treaty, practically, so as to substitute the German Empire for the several states with whom the convention was originally concluded. Counsel for appellee is forced to assume that position because extradition being an international act, and it being conceded that no extradition treaty exists between the United States and the German Empire, some theory as to the adoption of the treaty of 1852 by the present Empire and by our government with that Empire must be advanced. If the treaty in question has become the treaty of the German Empire, the process by which such a transformation took place is, in effect, the concluding of a new compact between the two nations. This is clear in the action taken in extending the treaty to the North German Union and renewing the one with Wuertenberg. Attention will be called to the Memorandum promulgated by the German Foreign Office in June, 1889, and found on page 725 *et seq.* of Vol. I in Moore on Extradition. From this Memorandum it will be contended that it is clear that the German Empire has recognized and adopted the treaty of 1852 as the treaty of the Empire. If this is true then the German Empire has practically attempted to conclude a new extradition treaty with this country. It may be that the promulgation of this Memorandum is sufficient to accomplish this end as far as the German Government is concerned. We doubt it, however, on account of the provisions of the German Constitution on the subject of treaties. But granting that such action is sufficient as far as the Empire is concerned, is it sufficient to make it a treaty of the United States?

In the first place, no memorandum of a like nature promulgated by the foreign office of the United States has been cited. If it had it would be insufficient because our

Constitution provides how treaties are to be made. Treaties can only be made by the president, by and with the advice and consent of the Senate.

Section 2, Art. II, Constitution.

No mere act by the Executive alone, or by the foreign department, can create treaty obligations. The political department of our government, as far as treaties are concerned, consists of the Executive and the Senate. The act of either alone is ineffectual. The acts of the political department in extraditing fugitives under the treaty of 1852, upon which acts counsel rely so much, have been the acts of the executive department alone. No act of consent and advice of the Senate has been, or can be, shown. Hence, the fact that for thirty years fugitives have been surrendered cannot even establish a course of conduct, a rule of interpretation, because such acts were performed and such a course was pursued by only one branch of the political department and not the *whole* thereof, as the Constitution requires. Furthermore, not even an opinion from the law department of the executive branch has been produced, holding that extradition under the conditions existing between this government and the German Empire or Prussia could now legally take place. In fact, we were told that warrants of surrender were issued as of course and a fugitive's only remedy was an appeal to the courts. And when the contention of appellee is that the treaty of 1852 has been extended to the German Empire, in effect renewed, action by the President, by and with the advice and consent of the Senate, is absolutely necessary under the Constitution, to make such extension and renewal effectual. Such action was taken, as already stated, in the cases of the ex-

tention to the North German Union and the renewal with Wuertemberg.

Treaties and Conventions, p. 790, 1146 (1889).

There can be no tacit ratification of the renewal or extension of a treaty under our Constitution. No treaty under our system of government becomes effectual because of failure to repudiate. Nor will mere affirmative action by the executive department alone create treaty obligations.

Taylor's Int. Pub. Law, p. 389 (note).

If the whole question of the existence of the treaty of 1852 must be left to the political department, as is claimed, then the action of such department in attempting to solve the problem is subject to review by the courts to determine whether such action was in accordance with the provisions of the Constitution, or not. If it appears that the action in attempting to renew, extend, in fact, conclude a new treaty, was not in accordance with the Constitution in that such action was not taken by and with the advice and consent of the Senate, then it must follow that no fugitive can now be legally surrendered to the German Empire or Prussia, no matter how many have been surrendered during the last thirty years. The provisions of the fourteenth amendment require "due process of law" before an alien even can be deprived of his liberty.

It may be urged that if it should be held that the treaty of 1852 was terminated, such decision would create confusion and might be considered a violation of our friendly relations with the German Empire. These suggestions

cannot be entertained by the Court. But even if they could be they are without merit. In the first place, by the law of nations no duty is imposed upon a nation to deliver up persons accused of crimes who have escaped into its territories on the demand of another nation against whose laws the alleged crime was committed. There is no such obligation under the principles of International Law.

Wharton's Digest, Section 268.
Wheaton's International Law (Boyd), Section 115.
U. S. v. *Watts*, 14 Fed. Rep., 130.

As every sovereign state is independent of every other in the exercise of its judicial powers (Wheaton, Section 111), it follows that if the courts of the United States should hold that under the Constitution and the laws of this country, no extradition treaty exists, no nation can have a just cause for complaint.

As to the surmised confusion that might arise in case our contention is sustained, suffice it to say that it could not possibly affect persons surrendered by either nation under what we contend is a terminated treaty because it has been uniformly held that it makes no difference how a person was brought within the jurisdiction of the court, the fact that the accused is in court is sufficient to require him to answer to the charge brought against him.

State v. *Brewster*, 7 Vt., 118.
Dow's Case, 18 Pa., 37.
The Richmond v. *U. S.*, 9 Cranch., 107.
Ker v. *People*, 110 Ill., 627.

And see

Ker v. *Illinois*, 119 U. S., 436.

A new treaty, properly concluded, can be easily made between the two nations and thus the anomaly existing between the United States and the German Empire on matters of extradition will be removed. No confusion can possibly result.

i.

Extradition under the treaty of 1852, granting that it was not terminated, is now legally impossible.

The jurisdiction of the commissioner to issue warrants for the extradition of fugitives, is created by the provisions of Sections 5270 of the Revised Statutes of the United States. This jurisdiction depends upon two facts:

First. That a treaty or convention for the extradition of fugitives between the demanding government and the government of the United States exists, and,

Second. That the fugitive is charged with having committed within the jurisdiction of such demanding government, any of the crimes enumerated in said treaty or convention.

As extradition proceedings are purely statutory, compliance with the statutes is requisite to jurisdiction at every step.

State v. *Huegin*, 85 N. W. Rep., 1046 (Wis.).
Church *Habeas Corpus*, Secs. 237-247.
In re Snell, 31 Minn., 110.
In re Hardigan, 57 Vt., 100.
People v. *Protectory*, 106 N. Y., 604.
Ex parte Becker, 86 Cal., 402.

Therefore, the existence of the two statutory conditions, treaty with demanding country, and a crime within

the territory of such demanding country, is absolutely essential to give the commissioner jurisdiction to issue the commitment under which appellant is now restrained.

What is meant by committing a crime within the jurisdiction of a foreign government?

> "A crime is an act committed or omitted in violation of a public law either forbidding or commanding it."
>
> 4 Bl. Com., 15.
>
> *U. S.* v. *Jacobi*, 1 Flip. (U. S.), 111.
>
> *In re Bergin*, 31 Wis., 386.
>
> *U. S.* v. *Eaton*, 144 U. S., 677.

Appellant is charged in the complaint with having committed the crime of forgery. Consequently he is charged with having violated the law of the demanding country forbidding the commission of forgery. Under our statutes the demanding country must have a law against forgery, which has been violated, before extradition can be considered at all.

A crime is an offense against the sovereignty and can only be taken notice of and punished by the sovereignty offended. Others have no concern in it and must treat it as a matter of indifference.

> *People* v. *Williams*, 24 Mich., 163.
>
> *Huntington* v. *Attrill*, 146 U. S., 657.

With the enforcement of the criminal laws of one independent state within its territory, another state has no concern.

> Wheaton's Inter. Law (Boyd), Sec. 113.

Applying these principles to the situation presented by the case at bar and granting, for the sake of argument,

that Prussia is still an independent nation, appellee must establish one of the following propositions to justify the commissioners' jurisdiction:

First. The German Empire is the demanding government and is entitled to the extradition of the appellant because a treaty exists between it and the United States and its criminal laws have been violated, or,

Second. Prussia is the demanding country and is entitled to receive appellant because a treaty exists between it and the United States and its laws have been violated.

If, however, it should transpire, as the fact is, that the country whose laws were violated has no extradition treaty with us and the country which has a treaty, has no criminal laws which appellant could have violated, then, we submit, extradition is legally impossible. That such is the situation we shall now proceed to demonstrate.

It is true that the complaint in question alleges that the demand is made by both the German Empire and the Kingdom of Prussia and repeatedly alleges that the laws of Prussia were violated by the alleged acts of the appellant. But when the provisions of law, which appellant is charged with having violated, are cited, such provisions are Imperial Laws and not a single Prussia criminal law or statute is cited, nor can one be cited, because it does not exist. In short, an attempt is here made to extradite appellant for having violated a law or laws of a nation with whom we have no treaty under the provisions of a convention with a nation whose laws have not been violated. As well might an attempt be made to extradite a fugitive from a foreign country to this country by a state of the Union whose laws have not been violated, for the violation of a Federal Law.

Previous to the formation of the German Empire the North German Union had adopted a criminal code. The German Constitution provides that Imperial legislation superceded all legislation as to civil and criminal matters and judicial procedure therefore enacted by the several states.

Dr. H. Wagner, University of Koenigsberg, in Ency. Brittanica, Article—Germany.

It is provided that the enactment of the general criminal law is exclusively confined to the Imperial Legislature.

Art. IV, Sec. 13, German Constitution (Hart. Intro. Fed. Gov., p. 135).

The criminal code of the North German Union, above referred to, was adopted as the code of the German Empire and took effect as such Imperial code January 1, 1872.

Art. 80, Subd. 2, German Constitution.
Proclamation of Emperor, Apr. 16, 1871.

The enacting chapter of the German Imperial Criminal Code establishes the fact that Prussia as such now has no criminal laws which can be violated and has not had any since January 1, 1871. By Sections one and two of this enacting chapter, it is provided that the Imperial Criminal Code is to take effect January 1, 1872, and that on that day all other criminal laws, codes and procedures then in force, with respect to subjects contained in the Imperial Code, were repealed.

Provisions as to the crime of forgery are found in this Imperial Code and are contained in Sections 267, 268, 146 and 149, the very sections quoted in the depositions filed with the amended complaint. No Prussian criminal

provisions were cited, for the sufficient reason that none exist. The Imperial laws of Germany are the laws of Prussia, the same as the Federal Laws are the laws of all the states. But the latter cannot attempt to enforce the laws of the general government because the sovereignty that creates the law can alone enforce it. The same is true of Prussia, as far as Imperial laws are concerned. If Prussia is still an independent nation, she then has no concern whatever in the violation of the Imperial laws. "The courts of no country execute the penal laws of another."

The Antelope, 10 Wheaton, 123.

It follows, then, that appellant cannot be charged with having committed forgery within the jurisdiction of the Kingdom of Prussia, and of what avail is the treaty of 1852, since the statute contains the jurisdictional requirement of both a treaty with and the commission of a crime within the jurisdiction of, the demanding government?

It is clear that the conditions existing at the time the treaty of 1852 was concluded have so materially and radically changed that even if such treaty was not *ipso facto* terminated by the formation of the German Empire, its obligations cannot now be performed and therefore the whole compact has absolutely expired.

Wheaton Int. Law (Boyd), Section 275.
Wharton's Digest, Section 137a.

If Prussia is still a nation, the crime of forgery, cannot now be committed within her jurisdiction, and consequently extradition at her demand is impossible under our laws. If she is no longer a nation, then she has

neither a treaty or a criminal code which can can be made the predicate for extradition—an international act.

It may be urged, as was in the court below, that although Prussia has now no specific criminal code, yet she merely delegated her power to enact criminal laws to the Empire and laws so enacted are still her own specific laws. A delegation of powers, without reservation, excludes the exercise of such delegated powers by the state surrendering them. Not only did Prussia voluntarily surrender her powers to enact criminal laws to the Empire, but with her consent her own existing criminal laws were repealed. Extradition under the treaty of 1852 with Prussia might as well be attempt in case the fugitive was charged with having committed the crime of forgery in France, as under the conditions existing in the case at bar, since Prussia has no more power to enforce the penal laws of the empire than she has to enforce the penal laws of France.

We may be told that this nation has no interest in the manner in which the criminal laws of another nation are enacted and enforced, and since the German Empire and the Kingdom of Prussia unite in demanding appellant's surrender, it is immaterial whose laws he is charged with having violated. The first part of this proposition we admit, but the second we emphatically deny, because our statutes make it an absolute condition, without the existence of which extradition cannot be considered, that a treaty shall exist with, and a crime committed within the jurisdiction of, the demanding country. That counsel appreciates the force of our position on this proposition is clear from the complaint itself because it contains repeated allegations that appellant violated the laws of the

Kingdom of Prussia. The trouble, however, is that when the provisions of laws which it is claimed were violated, are cited and quoted, it appears that they are Imperial laws and not Prussian laws.

Applying the jurisdictional requirements of Section 5270, Revised Statutes, to the facts and circumstances in the case at bar, we find that the German Empire demands the extradition of appellant because he is charged with having violated Imperial criminal laws. But it is admitted that no extradition treaty exists between the United States and the German Empire. Extradition, however, is sought to be effected by a treaty or convention in existence between the United States and Prussia. But no Prussian criminal laws have been violated; therefore, in either case, one of the necessary requirements for the jurisdiction of the commissioner is wanting. In one case no treaty exists and in the other case no law has been violated. This proposition, we submit, is decisive on this question. Forgery is not a crime within the jurisdiction of Prussia, although it is a crime within the jurisdiction of the German Empire, which jurisdiction extends over Prussian territory and is exclusive.

Taylor's Int. Pub. Law, p. 206.

To extradite appellant under the provisions of the treaty of 1852, would be in violation of the terms of the treaty itself, which provides that persons shall be delivered who have committed certain enumerated crimes "within the *jurisdiction* of either party," not territory, and who shall seek "an asylum, or shall be found in the *territories* of the other" (the pertinent section of the statute, 5270, uses the word *jurisdiction*). The United States will not grant extradition for crimes

not committed within the jurisdiction of the demanding state.

Hawley, Int. Extradition, 22.
Wharton's Digest, Section 271.

Fourth.

THE COURT OUGHT TO HAVE HEARD TESTIMONY FOR THE PURPOSE OF DETERMINING THE ISSUES RAISED BY THE PLEADINGS IN THE CASE.

The District Court held that the *habeas corpus* proceedings ought to be limited to an inspection of the papers on file with the commissioner, and if these disclosed no jurisdictional error, the writ ought to be dismissed.

We contend that testimony ought to have been received in connection with the record on file before the commissioner, *not for the purpose of determining the guilt or innocence of the prisoner, or the criminality or want of criminality, sufficient for his extradition*, but for the purpose of determining the legality or illegality of his restraint. We base our contention on the following proposition:

a.

The statutes of the United States so provide.

The statutes provide for the receiving of testimony on *habeas corpus* proceedings. The provisions are:

> "The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of ***habeas corpus*** for the purpose of *an inquiry into the cause of restraint of liberty.*" (Italics ours.)

Section 752, Revised Statutes.

"The court of justice, or judge shall proceed in a summary way to determine the facts of the case by *hearing testimony and arguments*, and thereupon to dispose of the party as law and justice require." (Italics ours.)

Section 761, Revised Statutes.

Appellant alleged in his petition a number of reasons why his restraint was unlawful and without authority in law, and we respectfully submit that under the sections of the statutes just quoted, the court ought to have received competent testimony when it was offered by the appellant.

b.

Habeas corpus proceedings are original, civil suits.

The *habeas corpus* proceeding before the District Court was an original civil proceeding. It has been established beyond question that the *habeas corpus* proceeding is a civil suit to enforce the civil right of personal liberty. It is not a criminal proceeding at all. If a criminal proceeding does precede it and the *habeas corpus* is brought in consequence of such criminal proceeding, yet the latter is still a civil suit and partakes in no way of the nature of the antecedent criminal proceeding.

Ex parte Tong, 108 U. S., 556.
Cross v. *Burke*, 146 U. S., 82.
Kurtz v. *Moffit*, 150 U. S., 487.
Ex parte Frederich, 149 U. S., 73.

The proceedings before the District Court being a civil suit, appellant was the plaintiff and the marshal the defendant. The petition was the bill on complaint; the return of the marshal, the answer and appellant's traverse the reply to such answer. These were the pleadings in

the case. The issue thus raised was the unlawful detention of the plaintiff, and it would have been proper for him, yea it was his duty, to introduce testimony tending to establish his cause of action.

c.

In a proper case the court can hear testimony outside of the record of the inferior tribunal.

Upon proper case presented by the petition and the traverse, a court will hear proof of facts outside of, though not inconsistent with, the record of the inferior court. The power of the court to do this cannot be questioned under the repeated decisions of this court.

In re Cuddy, 131 U. S., 280.
Ex parte Yerger, 8 Wall., 85.
Ex parte Mayfield, 141 U. S., 107.

We had alleged in our petition and traverse facts tending to show that appellant was entitled to a discharge, notwithstanding the commissioner's warrant of commitment. Under the authorities just cited, we respectfully submit, we were entitled to prove those facts.

d.

Before final judgment by a court of competent jurisdiction, the whole case will be examined under a habeas corpus proceeding.

It has been uniformly held that, before a final judgment by a court of competent jurisdiction, the Federal Courts may openly and freely investigate the warrant of commitment and go behind it and inquire into the facts upon which it is based.

U. S. v. *Hamilton*, 3 Dallas, 17.

Ex parte Burford, 3 Cranch., 448.
Ex parte Watkins, 3 Peters, 193.
Ex parte Bollman, 4 Cranch., 75.

The *habeas corpus* proceedings in the District Court had been brought before there had been a final judgment by a court of competent jurisdiction. The cause of the commitment was that appellant had committed an extraditable offense. He denied that by his traverse and under the authorities, the court ought to have heard the evidence and decided this question.

For these reasons, we respectfully submit, the District Court committed error in declining to hear testimony affecting the legality or illegality of appellant's restrain.

Fifth.

THE COURT OUGHT TO HAVE GRANTED APPELLANT'S PRAYER FOR A WRIT OF CERTIORARI IN AID OF THE WRIT OF HABEAS CORPUS.

The court having declined to receive testimony on the hearing, appellant sought to establish the issues raised by his pleadings by praying for a writ of *certiorari* in aid of the writ of *habeas corpus* so as to bring, at least, the record and testimony then before the commissioner, to the attention and for the consideration of the court. This prayer was denied. We submit that the prayer filed with the District Court alleged sufficient facts to have justified the court in granting it. (Rec., page 54.) It may be true that the granting of the writ of *certiorari* is within the discretion of the court to whom the application is made, yet this discretion is not an arbitrary one, but is a

sound, judicial discretion, dependent upon certain legal principles applicable to the case.

School Trustees v. *Directors*, 88 Ill., 100.
Flourney v. *Payne*, 28 Ark., 27.

Furthermore, the writ of certiorari was prayed for, in this case, in aid of the writ of *habeas corpus* and for the purpose of bringing before said District Court the full records of the case so that said court might have had all the facts before it in determining the issue raised. At common law the writ of certiorari was frequently used in aid of the writ of *habeas corpus* to bring up the record of the proceeding resulting in the commitment when such record was necessary to a complete understanding of the case.

Rex v. *Marks*, 3 East., 157.
Fazacharly v. *Baldo*, 1 Salk., 352.

In the Federal courts the writ of certiorari has been considered, in appropriate cases, as ancillary to that of *habeas corpus*, and has been frequently used as a means of rendering their jurisdiction under the latter writ effective, and even this court has granted writs of certiorari in aid of its original jurisdiction in cases of *habeas corpus*.

In re Martin, 3 Blatchf., 303.
Ex parte Yerger, 8 Wallace, 85.
Ex parte Jackson, 96 U. S., 727.
Ex parte Lange, 18 Wallace, 163.

The contention of counsel in the court below that the writ of certiorari is never granted before the final determination of the case pending in the lower court is untenable. At common law the writ was more properly

used to remove proceedings before judgment than after judgment.

Heinchman v. *Cook*, 20 N. J. L., 271.

Unless the common law writ has been modified by statute, it will be allowed at any stage of the criminal proceedings.

Rex v. *Hube*, 5 Ten. Rep., 542.
Rex v. *Wadley*, 4 M. & S., 508.
Mowery v. *Camden*, 49 N. J. L., 106.

But whatever the rule in this respect may be as to the granting of the writ, in the case at bar it was not prayed for to review the question of the commissioner's jurisdiction because his jurisdiction had already been challenged by the writ of *habeas corpus*, but to aid the latter writ by bringing up the record. The petition of appellant for this writ showed that its purpose was to bring before the court copies of the depositions taken in his matter before the German tribunals, the copy of the original warrant issued by the German court, copies of the provisions of the criminal code of the German Empire, all of which copies were on file with the commissioner at the time the writ of *habeas corpus* was issued. As the court had already declined to receive testimony, the importance of these records is readily appreciated when it is remembered that, waiving the question of the existence or non-existence of a treaty, appellant claimed these depositions, the warrant issued in Germany and the provisions of the German criminal code showed that he was not charged with an extraditable offense. Therefore, we respectfully submit that the District erred in denying appellant's petition for a writ of certiorari.

Sixth.

THE COURT ERRED IN HOLDING THAT THE RECORD BEFORE THE COURT SHOWED THE COMMISSION OF AN EXTRADITABLE OFFENSE.

In discussing this assignment of error we are compelled on account of the ruling of the District Court not to receive testimony on the hearing, to rely on the record as presented by the pleadings. In our traverse to the marshall's return to the writ of *habeas corpus*, we included the deposition taken in Germany and filed with the commissioner previous to the suing out of the writ and also translations of certain provisions of the German Laws, which provisions we deemed pertinent to the issue. The correctness of these depositions and provisions are not challenged and we are justified therefore in discussing them.

On account of the contention of counsel in the court below, we are compelled to call the attention of this Court to a fact which does not appear of record. The writ of *habeas corpus* was sued out of the District Court after the depositions taken in Germany had been filed, but before the hearing had been had and concluded before the commissioner. While the *habeas corpus* proceedings were pending and undetermined the commissioner proceeded, over our protest, with the extradition hearing and made his findings. Evidence in addition to the depositions included in our traverse, was introduced, and counsel have urged this fact as an insurmountable objection to the consideration of this specification of error. The proceedings of the commissioner after the writ was sued out are not considered by appellant in the case at bar, but the only

issues raised are those that existed *at the time* the case was brought into the District Court by the issuance of the writ.

In discussing this assignment of error, we shall briefly consider, first, the sufficiency of the complaint; and, second, the evidence.

I.

The amended complaint contains about twenty-four counts, and aside from the general omnibus count charging forgery, counterfeiting and uttering, it attempts, in substance, to charge:

First. The forging and uttering of forged stock certificates, the forgery consisting in the impression made upon said certificates by a simulated stamp, purporting to to show that the revenue tax had been paid.

Second. False, fraudulent and fictitious entries in account and invoice books and altering entries therein.

Third. Forging acceptances on bills of exchange and altering them. (Record, pp. 8-19.)

We shall confine ourselves to the first of these charges in discussing the sufficiency of the complaint, as the evidence, as we shall show later, utterly fails to establish the second and third charges.

As already intimated, the general charge of forging certain stock certificates is followed by an allegation, as was necessary, attempting to show in what the forgery consisted, and from this allegation it appears that the forgery consisted wholly and exclusively in affixing to said certificates the impression of a steel stamp, which impression purported to show that the revenue tax had been

paid. Appellant is likewise charged with having forged this stamp, and then it is charged that he did this to defraud the government out of its revenue. The certificates were forged to defraud certain parties named; the forgery consisted in a false revenue stamp, which stamp was forged to defraud the government. Nowhere it is charged that this stamp was necessary to give the instrument validity. The only purpose of the stamp was to show that the revenue tax had been paid. Under these conditions, was the placing of such a stamp forging *the whole instrument?*

What is meant by a certificate of stock? A certificate of stock is a right, strictly speaking, to participate in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers and the management of their concerns; to share in the dividends and profits and to receive an aliquot of the proceeds of the capital on winding up and terminating the active existence and operations of the corporation.

Fisher v. *Essex Bank*, 3 Gray, 377.
Farrington v. *Tennessee*, 95 U. S., 679.
McAllister v. *Kuhn*, 96 U. S., 87.

The certificate is merely the written acknowledgment by the corporation of the interest of the subscriber in its property and franchises. It transfers nothing from the company to the subscriber, but simply affords the latter evidence of his right.

Burr v. *Wilcox*, 22 N. Y., 551.

The certificates in question comply exactly with these definitions. (Rec., pp. 39, 43.) The signatures were all genuine, the endorsements of their entry in the stock book

were genuine, and since Terlinden was the only stockholder he could issue as many certificates as he wished. The only thing not genuine, as far as the allegations of the complaint are concerned, was the impression on the face of the certificates that the revenue tax had not been paid.

Appellant being the only stockholder (Rec., p. 38), and therefore lawfully entitled to issue as many certificates of stock as he wanted to, these certificates were nothing more than promissory notes, to be paid when the corporation was dissolved, and meanwhile to draw such interest as the dividends paid out of the surplus profits would amount to. But these notes were required to pay two per cent. revenue tax. It does not appear, nor is it alleged, that the affixing of such stamp was necessary to give the certificate of stock negotiability even. If appellant issued and negotiated the certificates of stock, representing them to be genuine stock of his own corporation, of which he was the only stockholder, and it should appear that they were not original and genuine stock certificates, the most he could be guilty of would be obtaining credit by false pretenses, which offense is not included within the extradition treaty of 1852, if said treaty should be held to be still in force.

Another view of the case under such circumstances is that appellant could be charged with having "watered" his stock. "Watered stock" has been defined as stock issued without any consideration, and has been held to be perpetrating a wrong upon the corporation and fraud upon every person who takes such stock as full paid stock.

Barnes v. *Brown*, 80 N. Y., 534.

By issuing watered stock in this case, appellant could not perpetrate a wrong upon the corporation, because he was the corporation, and if a fraud was committed upon others who took it, he could not be guilty of forgery, but at most of false pretenses. Persons taking such stock could hold the corporation liable in damages, which in this case meant appellant.

Allen v. *Ry. Co.*, 150 Mass., 207.
Moores v. *Citizens' Bank*, 111 U. S., 156.

Under the peculiar conditions of this case, appellant was liable for all certificates, whether genuine or spurious. Under such circumstances it seems impossible that any stock, issued as the stock in question was, the signatures genuine, and issued by the only stockholder of the corporation, could be spurious.

Our conclusion on this branch of the argument is, that as appellant was the corporation, he could issue as many certificates as he wished, such certificates being in effect but promissory notes, unless the charter of the corporation limited such stock issue, and if it did, then the issue would be "watered stock" and he would be personally liable the same as he was for the stock issued within the limits of the charter provision. At any rate, he cannot be guilty, under any possible construction of the case, of forgery, but at most, false pretenses, provided he represented that the alleged spurious stock was within the limits of the charter of the corporation.

Referring again to the alleged forged revenue stamp, we desire to say that it has been repeatedly held that the Stamp Act, that is, the revenue stamp act, is a mere revenue law, which does not affect the validity of the instrument.

Rex v. *Norton*, 2 East. C. C. L., 856.

People v. *Frank*, 28 Cal., 507.
Cross v. *People*, 47 Ill., 152.
State v. *Hill*, 30 Wis., 416.
Campbell v. *Wilcox*, 10 Wall., 421.

The above decisions are all based on acts which required certain instruments to be stamped, and invalid and of no effect if the stamp was omitted with intent to defraud the government of the stamp duty.

The German laws provide for the making and using of a false stamp impression or false stamp, indicating the payment of the tax, and a special punishment is imposed, not exceeding three months' imprisonment.

German Penal Statutes, Sec. 275.

(Rec., p. 29.)

Another provision of the German laws provides that the person who uses a stamp upon papers held equal to paper money, under Section 149, which stamp was prepared without authority, is punishable by a fine not exceeding 150 marks.

German Penal Stat., Subd. 4 and 6, Sec. 360.

(Rec., p. 28.)

Consequently under all the authorities cited, granting that the stamp in question was spurious, the using of this stamp upon these certificates did not constitute forging the instruments themselves. As shown, the using of such stamp would have been at most a slight misdemeanor; certainly not an extraditable offense.

It has been held that a forged certificate on the face of a check, showing that the drawer had money in the bank, is not forgery of the check.

Clements v. *People*, 5 Parker's C. R., 337.

We therefore submit that under no possible construction of the law applicable to the case, the alleged spurious stamp upon the certificates of stock can be considered as forgery, as an extraditable offense, granting that appellant committed this particular act as charged.

II.

In discussing the evidence before the court on the appeal, not for the purpose of reviewing the sufficiency of the evidence, but for the purpose of showing that this appellant is not guilty of an extraditable offense, we shall take up the three charges as alleged in the complaint.

a.

The alleged false entries in the invoice book.

This allegation is attempted to be established by the testimony of one Henry Latwesen. (Rec., pp. 34-35.) He states that in April or May his bank became suspicious whether the drafts drawn by Terlinden were drawn against actual delivery of goods; that his colleague Arrioni made an examination of the books of the Terlinden Stock Company, particularly the invoice book; that it appeared that the original invoices corresponded with the amount of the draft; that when the crash came, it became apparent that the invoices which were found in the copy-book, were in fact fictitious. That is his whole testimony. He does not state how this became apparent, who submitted the copy-book, who made the entries and who had charge of the books. Neither Schulte or Seven, who swore that the acceptances on a draft purporting to have been drawn against them for actual delivery of goods, were spurious, deny that they had received goods against

which drafts might be drawn. Where, then, is the evidence that the entries in the invoice book were fictitious? Where is the evidence that appellant had anything to do with the books? It must be remembered that only after the "crash" came, did these people claim the acceptances were forged. The goods, no doubt, were delivered, but they did not want to pay for them then, and if the goods were delivered the entries in the invoice book were genuine. But whether these entries were genuine or not, there is absolutely no evidence to show that appellant had anything to do with the books, knew anything about them, nor is any circumstance shown from which it could be inferred, first, that there were false entries, and, second, if there were, that appellant had anything to do with or knew anything about them. The only testimony on this charge is that of this witness, Latwesen.

b.

The alleged forged acceptances on the drafts.

The drafts, the acceptance of which are claimed to be forgeries, are three in number and the names which are claimed to be fictitious are Henry Schulte and William Seven. In the first place, all these drafts are signed by the Gerhard Terlinden Stock Company, Kospadt p. Mueller, clearly indicating that the appellant had no personal connection with the transaction. (Rec., pp. 35, 36, 47, 49, 50.) It appears from the testimony that Kosbadt was the financial man of the concern; the treasurer, as it were, who attended to all money matters of the corporation and had that department of the business entirely and exclusively under his management. The appellant was the practical man of the institution, the mechanical manager, the mechanical expert.

The witness Schulte testifies that he gave appellant a draft book and "rather often signed acceptances both in blank as well as such as were filled." (Rec., p. 33.)

He denies that the signature or acceptance on the particular draft was his. He does not testify that he knows who signed his name and can't even surmise. On the same page he deposes that he told Terlinden he would accept no more drafts, yet on the same day he accepted twelve drafts. (Rec., p. 48.)

The witness Seven likewise testifies that he did not sign the two acceptances on two certain drafts, "but I cannot testify who did execute these signatures." (Rec., p. 36.)

He testifies to a long series of draft transactions between him and the corporation extending over seven years. Recalled, this witness deposes that during the past years it often happened that drafts which he had not accepted were sent to him for redemption, and though protesting, he paid them. "Kosbadt at that time admitted to me—this may have been the latter part of 1900—that he wrote my name, and that he had direction from Terlinden to do this, Kosbadt did not say." (Rec., p. 51.)

This is all the material testimony of the two persons whose acceptances are claimed to be forged gave. The testimony of the other two witnesses shows that the appellant had absolutely nothing to do with the acceptances, granting that they were forged, and we do not—nor knew anything about them.

The book-keeper, Wentges, testifies that he drew a whole row of drafts upon Schulte and Seven. "At the present time I do not remember a single case in which Terlinden or Kosbadt gave me an acceptance from

Schulte or Seven." Who placed the signatures upon the drafts he does not know. "At the end of March or the beginning of April, 1901, Terderlin told me personally that he should not draw on Schulte any more." (Rec., pp. 48-49.)

This shows that Terlinden complied with Schulte's request, made in March, 1901, not to draw on him any more.

This witness likewise testifies that he and Kosbadt signed the drafts in the name of the company. (Rec., p. 49.)

The witness Mueller testifies:

"The acceptances were on the drafts before I signed them. If they are forgeries, they were executed either by Terlinden, Miss Bath or Kosbadt. I cannot say who executed them. I also signed the letters with which they were sent to the bank. The drafts came in portfolios, sent by Miss Bath or Terlinden, and the portfolios were opened by Kosbadt, who had the key. Can't remember whether I was ever present when the portfolio was opened." (Rec., p. 52.)

This is all the material testimony in regard to the forged acceptance. They prove absolutely nothing against appellant, because:

First. All drafts were signed by Kosbadt or Mueller and clearly Terlinden never saw them.

Second. Both men had signed acceptances on blank drafts and honored them when presented and filled out.

Third. Granting the acceptance to be forgeries, no one even surmises that Terlinden did the work.

Fourth. When Schulte asked to have no more drafts drawn on him, Terlinden gave his book-keeper instructions not to draw on him again.

Fifth. Kosbadt admitted that he signed Seven's name to former drafts, which were honored, and did so without direction from Terlinden.

Sixth. Terlinden had absolutely nothing to do with this branch of the business, which was under the direct supervision of Kosbadt, Wentges and Mueller.

There is, therefore, not even any *ex parte* evidence whatever in regard to Terlinden's connection with these alleged forgeries and that branch of the case is out of the question.

c.

The alleged forged certificates of stock.

We have already argued that the allegations of the complaint did not show any forgery of certificates. The alleged forged stamp impression is not a forgery of the instruments themselves. But appellant's connection with the stamp transaction is not established at all. All the testimony on this point is given by the witness Ludwig Schulte, boss-painter. The witness is entirely unreliable and his testimony absolutely worthless. He claims to have prepared this counterfeit stamp under the direction and compulsion of appellant. (Rec., pp. 31, 32, 46, 47.)

The witness is incompetent to establish the forgery because, if his story is true, he is an accomplice and his testimony is worthless unless corroborated. He admits that he made the spurious stamp. Under the provisions of the German Criminal Code, Sec. 49 (Rec., p. 28), he could be punished as principal, being at least an aider or abettor.

In this connection a word on the question of presumptions. The accused is charged with forgery, etc., and specifically in the complaint with forging this stamp with intent to defraud, a specific intent. He certainly could make or order to be made, as many stamps of the kind described, unless he did so with "fraudulent intent." It is elementary, "when a specific intent is required to make an act an offense, that the doing of the act does not raise a presumption that it was done with specific intent."

Lawson on Presumptive Evd., 472.
People v. *Platt*, 100 N. Y., 592.

Hence the testimony of Schulte, standing alone, proves absolutely nothing. Uncorroborated in its essential elements, as it is, it cannot be considered.

The only attempt to prove the fact of forgery of the certificates by the accused, the *corpus delicti*, is the testimony of an accomplice. According to the elementary rule of evidence, the *corpus delicti* must be proven beyond a reasonable doubt and by the best evidenc .

Com. v. *York*, 9 Metc., 93.
People v. *Schriver*, 42 N. Y., 1.

Since the uncorroborated evidence of this accomplice would not be allowed to establish appellant's connection with the offense, how can it be held to establish the existence of the criminal act itself?

The *corpus delicti*, according to all authorities, can be proven only by direct evidence or circumstantial evidence of the most cogent and irresistible nature.

Best on Evid., Sec. 442.
3 Greenleaf on Evid., Sec. 30.

It cannot be proven by extra-judicial confession alone. It is likewise laid down that the testimony of an accomplice can only be considered as connecting the defendant with the crime.

Wharton Am. Crim. Law, Sec. 785.

This is true upon principle because if the *corpus delicti* could be established by the testimony of an accomplice, it would be tantamount to establishing the "body of the crime" by a confession.

According to the German Criminal Code, the witness Schulte was incompetent to testify at all. "Persons who with reference to the subject under inquiry are suspected as accomplice, accessory or aider or abettor, or have already been sentenced, are incompetent to testify."

German Procedure, Sec. 56, par. 3 (Rec., p. 29).

Why, nevertheless, he was permitted to testify can only be surmised. The whole procedure being *ex parte* and apparently tainted with an attempt to brand appellant as a criminal *par excellence*, is suspicious and repugnant to the American conception of a fair and impartial hearing.

Conclusion.

We have endeavored to demonstrate to your Honors that the District Court erred in declining to receive evidence affecting the legality of appellant's restraint; in declining to issue a writ of *certiorari* to bring up the record from the commissioner; in holding that the question of the existence of a treaty for the extradition of fugitives from the United States to Germany was a political question, and not a judicial one; in holding, in effect at least, that such treaty existed; and in holding that the records show the commission of an extraditable offense.

The question of the non-existence or existence of an extradition treaty between the United States and the German Empire is the most important one, no doubt. But we leave this case with your Honors, with this last suggestion,—whether a treaty exists or not,—how can a government, whose laws have been violated, demand the extradition of a fugitive under the contract of a state whose laws have not been violated?

Respectfully submitted.

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No. 475.

Brf. of Clerk for Appellee.

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Filed Nov. 26, 1901.

IN THE

Supreme Court of the United States.

GERHARD TERLINDEN, *Appellant,*

vs.

JOHN C. AMES, UNITED STATES MARSHAL, *Appellee.*

475.

Appeal from District Court of the United States for the Northern District of Illinois.

MOTION TO ADVANCE CASE.

WILLIAM VOCKE AND
WILLIAM MANNHARDT,
ATTORNEYS FOR APPELLEE.

VOCKE & HEALY,
OF COUNSEL.

BARNARD & MILLER PRINT. CHICAGO.

IN THE

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MOTION TO ADVANCE CASE.

And now comes John C. Ames, United States Marshal for the Northern District of Illinois, appellee, and moves this court to advance the above cause upon the docket.

And for cause of said motion appellee shows as follows, to wit: This is an appeal from the order of the United States District Court for the Northern District of Illinois discharging the writ of habeas corpus prosecuted by the appellant and remanding appellant to the custody of the marshal.

Appellant is now and has ever since the 16th of August, 1901, been confined in the common jail of Cook county in the Northern District of Illinois, under and by virtue of two certain warrants issued by Mark A. Foote, Esq., a United States commissioner specially authorized, etc., upon complaint of Walther Wever, Imperial German Consul at Chicago, and the duly accredited representative of the Kingdom of Prussia, charging appellant with various extraditable crimes, namely, forgery and the utter-

ance of forged instruments, committed as a subject of the Kingdom of Prussia within the jurisdiction of said kingdom, and therefore asking that appellant be committed in order that the evidence of his criminality might be inquired into, and that he might be extradited, and delivered up to the justice of the said Kingdom of Prussia in accordance with the stipulations of the treaty concluded between the governments of the United States of America and the Kingdom of Prussia on the 16th of June, 1852.

Said commissioner has, in accordance with said complaint heard all the evidence adduced against the appellant, and on the 4th of November, 1901, reported the same to the State Department at Washington, setting forth that the several charges of forgery and utterance of forged instruments have been fully sustained by the evidence, and recommending that a warrant for appellant's extradition to the authorities of the Kingdom of Prussia be issued.

The State Department has carefully examined said commissioner's report, together with all the evidence and the record of all other proceedings taken and had before said commissioner at the hearing of the cause against said appellant, has likewise found that said evidence fully sustains the charges of forgery and the utterance of forged instruments preferred against appellant, and has accordingly issued the warrant of extradition, and has placed the same into the hands of the Imperial German Embassy at Washington, and this appellee is therefore prepared to deliver the appellant over to the representatives of the Imperial German Government and the Kingdom of Prussia, in order that he may be delivered up to the judicial authorities of said kingdom.

The further detention of said appellant in the jail of the Northern District of Illinois, works not only a serious hardship to him, but is also attended with considerable expense to the complaining government.

All of which is respectfully submitted.

JOHN C. AMES,
United States Marshal, in and for the Northern District of Illinois.

by WILLIAM VOCKE,
WILLIAM MANNHARDT,
his Attorneys.

VOCKE & HEALY,
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Wm. H. Clark
of Counsel

No. 475.
Brief of Vocke for Appellee
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BRIEF.

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BRIEF.

MAY IT PLEASE THE COURT:

The appeal in this case was first prosecuted by appellant to the Circuit Court of Appeals for the Seventh Circuit, but dismissed upon our motion for the reason that it involved the validity of a treaty and was therefore not cognizable by said court under the provisions of Sections 5 and 6 of the Act establishing the United States Circuit Courts of Appeals. Before the motion was decided, counsel for appellant had prepared and filed their briefs and arguments upon the several errors assigned by them, but they utterly failed to give a correct synopsis of the facts and pleadings in the case as presented by the record. Their brief presented here has not been accessible to us in the preparation of our work, and fearing that a clear and satisfactory recital of the vital points disclosed by the record may be again omitted by them, we beg to avail ourselves of the privilege extended to us by Section 3 of Rule 21 of this Honorable Court and preface our brief with the following

STATEMENT OF THE CASE.

On the 15th of August, A. D. 1901, Dr. jur. Walther Wever, Imperial German Consul at Chicago, and the duly accredited official agent of the Kingdom of Prussia, appeared before Mark A. Foote, Esq., a commissioner of the United States of America in and for the Northern District of Illinois, and specially authorized to issue warrants for the apprehension of fugitives from the justice of foreign governments, and filed his complaint under oath charging in substance that one Gerhard Terlinden, *alias* Theodor Graefe, a subject of the Kingdom of Prussia, did, within the first six months of the year 1901, within the jurisdiction of said kingdom, commit various crimes of forgery, counterfeiting and the utterance of forged papers, chiefly in this, that as a director of the Gerhard Terlinden Stock Company, organized and doing business in said kingdom, said Gerhard Terlinden, *alias* Theodor Graefe, forged and counterfeited a large number of certificates of stock of said company amounting to about a million and a half of marks, German money, equal to about $375,000 of American currency, and put off, uttered and disposed of the same to Robert Suermont of the city of Aachen, in Prussia, to the Amsterdamsche Bank at Amsterdam, Holland, to the Disconto Gesellschaft, a corporation at Berlin, Prussia, and to others, with felonious intent to cheat and defraud said several persons and corporations.

The complaint further charges that said Gerhard Terlinden, *alias* Theodor Graefe, was at the time of committing said several crimes a resident and citizen of the King-

dom of Prussia; that he is a fugitive from the justice of said kingdom; that about July last he fled into the jurisdiction of the United States of America for the purpose of seeking an asylum therein; that he is said to be concealed within the Northern District of Illinois or in the Eastern District of Wisconsin, and that the crimes with which he is charged are crimes embraced within the treaty of extradition between the United States of America and the Kingdom of Prussia concluded on the 16th of June, 1852, and ratified May 31, 1853.

The complainant therefore prays that a warrant be issued for the apprehension and commitment of the said Gerhard Terlinden, *alias* Theodor Graefe,

> "in order that the evidence of his criminality may be inquired into, and the said Gerhard Terlinden, *alias* Theodor Graefe, may be extradited and delivered up to the justice of the said Kingdom of Prussia, in accordance with the stipulations of said treaty and the acts of Congress passed in pursuance thereof." (Rec., p. 6.)

The commissioner accordingly issued his warrant, which was placed in the hands of John C. Ames, United States marshal in and for the Northern District of Illinois (Rec., p. 7), and the fugitive was thereupon apprehended in the Eastern District of Wisconsin and brought into the Northern District of Illinois to be arraigned and dealt with as provided by law.

Before any evidence was heard under said complaint the said Walther Wever, in his capacity as German Consul and duly authorized representative of the Kingdom of Prussia, having meanwhile been more specifically advised by the depositions of several witnesses taken in the court of competent jurisdiction in Prussia, in which the criminal prosecution against said Gerhard Terlinden, *alias*

Theodor Graefe, is pending, that the several crimes with which said fugitive is charged were much more extensive and enormous than at first reported, and deeming it necessary in furtherance of justice, that the commissioner should take cognizance of all of said charges, submitted to said officer on the 25th of September last another complaint charging minutely in a number of specific counts (Rec., pp. 8-19):

1. The forging of a large number of stock certificates of the Gerhard Terlinden Stock Company or causing these forgeries to be committed.

2. Uttering said stock certificates, well knowing them to be forged or causing this to be done.

3. Forging and counterfeiting the steel stamp of the Royal Prussian Revenue Office at Duisburg, Prussia, or causing this to be done.

4. Imprinting said forged steel stamp upon said forged certificates of stock so as to make it appear that the tax required by the Prussian revenue laws to be paid upon certificates issued by stock companies in said kingdom had been duly paid and thus to give said forged certificates the appearance of genuine ones, or causing this to be done.

5. Uttering forged certificates of stock with said forged revenue stamp imprinted thereon, or causing this to be done.

6. Forging the acceptance of one Heinrich Schulte to a certain draft for 9,582.35 marks and uttering the same, or causing the acceptance to be forged and the forged draft to be uttered.

7. Forging the acceptance of one Wilhelm Seven to two certain drafts for 26,250 and 25,912.45 marks,

respectively, and uttering the same, or causing this to be done, etc., etc., all "contrary to the laws of the Kingdom of Prussia."

We beg leave to call particular attention to the several counts relating to the forgery and the utterance of the stock certificates in which it is minutely recited that in one case the said Terlinden, *alias* Graefe,

> "falsely made, forged and counterfeited 400 certain instruments purporting to be genuine stock certificates of the Gerhard Terlinden Stock Company, each of the face value of 1,000 marks, and uttered the same, etc., etc., with intent to cheat and defraud the Disconto Gesellschaft of Berlin"—etc.

In the other that he

> "falsely made, etc., 133 certain other such certificates, each of the face value of one thousand marks, German coin, anl uttered them with the intent to cheat and defraud the Amsterdamsche Bank," etc., etc.

All these acts are charged in the several counts of the complaint as distinct forgeries, wholly separate and apart from the forging of the royal Prussian revenue stamp and the imprinting of the same upon forged certificates. The forgery of the stamp is set forth in later counts and constitutes a wholly different charge.

We are moved to submit these considerations to the court by the fact that counsel for the appellant in their printed briefs submitted to the court below made the following wholly unwarranted statements:

> "It appears that the forgery (of the stock certificates) consisted wholly and exclusively in affixing to said certificates the impression of a steel stamp and the signatures were all genuine, the endorsement of their entry in the stock book was genuine."

We are not sure but that said statements may be repeated in this Honorable Court.

The form of the stock certificates which appellant is charged with having forged appears upon record page 39. This shows that they bore, besides his own, the signature of another officer of the corporation, Winterberg by name, and the charges in the complaints, therefore, not only involved the forgery of the consecutive number stamped upon each one of the false certificates, to give them the appearance of the genuine ones bearing the corresponding number, but also that of the signature of said officer. It is also in evidence that there was no entry of this forged stock made on the stock book, but that this book disappeared when Terlinden fled.

Upon the second complaint filed by the consul as aforesaid and showing likewise that the crimes charged were committed within the jurisdiction of the kingdom of Prussia, also that the fugitive was at the time of committing the same a subject of said kingdom, the commissioner, in accordance with the prayer of said complaint, issued another warrant, which was served upon the appellant on the following day, to wit: on the 26th of September, whereupon the proceedings under the former warrant were dismissed.

On the 19th day of October, 1901, the German Consul, having meanwhile received additional advices through his government as to still further crimes of a similar nature committed by said fugitive, filed another complaint before said commissioner, charging specifically the forgery of 500 and of 200 certificates of stock of the Gerhard Terlinden Stock Company, each of the face value of 1,000 marks, German coin, and the utterance of the same by the

said Gerhard Terlinden to Robert Suermont of the city of Aachen, and to the Norddeutsche Bank of Hamburg, respectively. This was also some time before the hearing of the case took place. This third complaint does not appear in the record for reasons which will hereinafter be pointed out.

On the 17th of October last, before any evidence was taken before the commissioner, appellant presented to the District Court of the United States for the Northern District of Illinois his petition praying for a writ of *habeas corpus* upon the following grounds (Rec., p. 3):

1. No treaty or convention for the extradition of fugitives from justice exists between the United States and the German Empire.

2. The treaty or convention for the extradition of fugitives from justice concluded between the United States and the kingdom of Prussia on the 16th of June, 1852, was terminated by the creation of the German Empire, and the adoption of the German constitution in 1871.

3. The complaint filed before the commissioner does not charge an extraditable offense under the provisions of said treaty. (This refers to the second complaint as will appear from the record later on.)

4. The petitioner is not guilty of any extraditable offense under the provisions of said treaty, were the same still in force and of binding effect.

5. All proceedings had or attempted to be had before the commissioner under said complaint and warrant are illegal, void and without authority of law, because the commissioner did not have jurisdiction over the person of the petitioner.

The writ being issued the marshal of the Northern District of Illinois filed his return on the 21st of October setting forth in substance that he

"arrested said petitioner within said district on the 26th day of September, 1901, upon a warrant duly issued by Mark A. Foote, a United States Commis-

sioner specially appointed and authorized, etc., which said warrant was duly issued by said commissioner upon the complaint of Walther Wever, Imperial German Consul at Chicago, as representative of the kingdom of Prussia, charging said Gerhard Terlinden, who falsely assumed in this country the name of Theodor Graefe, with having, as a subject of the kingdom of Prussia and within the jurisdiction of the said kingdom, committed the crimes of forgery, counterfeiting and the utterance of forged instruments, and with being a fugitive from the justice of said kingdom of Prussia," etc.

On said 21st of October the petition for the writ was brought up for hearing and "after arguments of counsel the court not being now fully advised in the premises," it was:

"Ordered that this matter be further submitted to the court on briefs to be filed in five days and that this matter be set down for further hearing on October 28, A. D. 1901, at ten o'clock A. M." (Rec., p. 26.)

On the day last aforesaid

"the matter coming on to be heard on the return of the marshal to the writ of *habeas corpus:* It is ordered that the hearing of said matter be and the same is continued until to-morrow morning at ten o'clock." (Rec., p. 26.)

On that same day the relator's counsel, without any notice whatever to the marshal or his attorneys, placed on file with the clerk of the court an instrument which they call a traverse, but which, without questioning any of the facts charged in the marshal's return, contains a lot of matter all of which is wholly irrelevant to the issues. Said "traverse," presented under the oath of Gerhard Terlinden, recites substantially as follows (Rec., p. 27):

"That on the 26th of September, 1901, a complaint was filed with Mark A. Foote, United States commissioner, etc., upon which a warrant was issued

and the relator arrested; that with said complaint there were filed copies of the original testimony, etc., taken before certain court officers in the Empire of Germany relative to the alleged offenses with which he is charged, with English translation thereof,"

and then setting forth that the complaint refers to said depositions in express language the "traverse" recites from the complaint the following passages in relation thereto:

> "And the undersigned herewith submits to the commissioner and files with this complaint a copy of all depositions of witnesses taken in said matter, *together with a copy of the warrant of arrest issued by said court against the said Gerhard Terlinden, alias Theodor Graefe, and of the provisions of the penal code of the German Empire applicable to said several crimes and providing punishment therefor.*"

The relator then proceeds to state in his sworn "traverse":

> "That the provisions of the Criminal Code applicable to the facts and circumstances of this case as shown by the evidence hereto annexed are Sections 240, 47, 49, first paragraph; Section 360, fourth and fifth paragraphs; Section 275 and Section 56 of the Code of Criminal Procedure, also Section 234 of the Civil Code, a correct translation of which are hereto annexed and made a part hereof, etc.; that said depositions do not show that the petitioner is guilty of an extraditable offense; that a copy thereof is filed with said traverse; and petitioner therefore prays that the return of the marshal be dismissed and that he be discharged."

No attempt whatever is made to show how and where the relator acquired his competency to testify as to what are the provisions of the penal or civil code of the German Empire applicable to his case, but in their effort to supply this omission counsel file with the "traverse" the

affidavit of one Oscar Heinrich of Milwaukee, (Rec., p. 30), setting forth in substance

> "that he studied law in Germany; that he is familiar with the constitution, civil and penal codes of the German Empire now in force; that he understands German and English; that he has made the annexed translations of certain sections and parts of sections of the German Constitution and of the German civil and penal codes (the court will find that not a single one of the sections of the German Constitution is annexed); that said translations are correct, and that *the translations hereto annexed are the translations of the official and authentic provisions of the Constitution, civil and penal code of the German Empire, as they now exist, indicated by the number of the article, or section, etc., as identified by the proper reference found at the beginning of each article or section,*" etc.

This "expert" does not bear out the petitioner that what he claims to quote from the "German Constitution and the civil and penal codes" is all the law applicable to his case. but even if he did we submit that courts of justice have never yet permitted foreign laws to be proven as is here attempted to be done.

But the question is pertinent: What was the object in making this attempt? According to the relator's own admission made in this "traverse" the warrant of arrest issued by the German court in which he is called upon to answer for the crimes with which he is charged contained all the advice he needed on the subject of the laws applicable to his case. He found the warrant attached to the depositions and it requires no assurance that the genuineness of the laws quoted therein as well as their applicability to his case, were properly and legally authenticated to be available at the hearing before the commissioner. Upon examination of the rec-

ord the court will find, however, that, while the relator files with his "traverse" what he claims to be a copy of the depositions filed with the commissioner in support of the complaint he does not bring into court the warrant of the German judge and the provisions of the German law therein contained, but suppresses them.

(In order to avoid recurring to this topic in the discussion of the law involved in this case, we will briefly insert right here, however, that under the rules the traverse in a case of this character concludes the pleadings, and the allegations it contains, even if relevant, are treated by the courts as denied by the respondent without the requirement of a formal rejoinder.

Leary's case, 6th Abb. n. c. (N. Y.), 43.
U. S. v. Williamson, 3 Am. L. Reg., 729.)

Although the relator, according to his own showing, had it as much in his power to submit a copy of the German warrant with the provisions of the German penal code therein contained as to file with his "traverse" a copy of the depositions to which the warrant was attached, he nevertheless came into court on the said 29th of October, to which day the cause had been continued, and presented his petition for a writ of *certiorari* upon the following grounds (Rec., p. 54), to wit:

> "First. That there are on file before the commissioner the original complaint and warrant upon which petitioner was apprehended, and also the amended complaint and new warrant upon which he was arrested; that with said amended complaint filed with said commissioner on the 26th of September, 1901, there were filed certain depositions taken in Germany, which said depositions likewise contained copies of various provisions of the German Criminal Code, alleged to have been violated; that said depositions

also contained a copy of the original warrants issued by the German courts; that *said depositions and said copies of the provisions of the German Criminal Code and the copy of said original warrant were specifically identified and referred to by said amended complaint filed as aforesaid.*

Second. That the petitioner has alleged as one of the causes of the illegality of his restraint that the amended complaint in question does not allege an extraditable offense; that in order to determine the sufficiency of the complaint as affecting the jurisdiction of the commissioner, it is necessary to have before this court the provisions of the German law filed as heretofore set forth in this petition, and also a copy of the original warrant issued by the courts of the German Empire.

Third. That in order fully to determine the questions raised by petitioner's petition herein as to whether there exists a treaty between the government of the United States and the German Empire for the extradition of persons charged with the offenses alleged in said warrant issued by the court of the German Empire, it is necessary to have the depositions, provisions of the German Criminal Code and copy of the original warrant issued by said German court.

Wherefore petitioner prays that the court may issue a writ of *certiorari*, ordering the said Mark A. Foote, Esq., United States commissioner, to certify to this court the records herein referred to and in his possession at the time the writ of *habeas corpus* was issued," etc.

Signed and sworn to by Gerhard Terlinden.

The court on reading and considering said petition and hearing arguments of counsel took the matter under further advisement (Rec., p. 56), adjourned it until the 31st of October, 1901, and on said day, denying the petition for a writ of *certiorari*, further ordered (Rec., p. 56) as follows, to wit:

"That the question of whether since the formation of the German Empire the extradition treaty con-

cluded between the government of the United States and the Kingdom of Prussia in 1852 is still in force or abrogated by the constitution of the German Empire, be submitted to the court on briefs to be filed by the relator on November 2, 1901, at ten o'clock A. M. and reply brief by Monday, November 4, 1901, at ten o'clock A. M., and the further hearing of this matter is continued until Tuesday, November 5, at ten o'clock A. M. It is further ordered that said relator be remanded to the custody of the marshal *and that the motion to stay all further proceedings before the United States commissioner be and the same hereby is denied.*"

And afterwards, to wit: on the 5th day of November, A. D. 1901, the following order was entered in said cause, to wit:

"This cause coming on to be heard on the petition filed herein, the return of the marshal to the writ of *habeas corpus* and the traverse of the relator, comes the petitioner by Albert W. May, Esq., his attorney, and in custody of the marshal and comes also John C. Ames, the marshal for this district, the respondent herein, by William Vocke, Esq., his attorney. Thereupon the court having heard the arguments of counsel for the petitioner and for said respondent and being fully advised in the premises, finds that said petitioner is lawfully restrained from his liberty. It is thereupon ordered, etc., that the petition in this cause be and the same hereby is dismissed and that said petitioner Gerhard Terlinden be and he hereby is remanded to the custody of said marshal, and that said petitioner pay the costs of this proceeding, to which ruling of the court said petitioner by his counsel duly excepts, and on his motion for an appeal from said ruling it is ordered, etc., that the amount of the appeal bond herein be and the same hereby is fixed at the sum of five hundred dollars." (Rec., p. 57.)

Petitioner's counsel thereupon perfected an appeal to the United States Circuit Court of Appeals for the

Seventh Circuit (Rec., p. 60) and assigned therein the following errors:

1. The court erred in declining to hold that no treaty exists between the United States of America on the one part and the Kingdom of Prussia or the German Empire on the other.

2. The court erred in holding that the question of the existence of a treaty must be determined by the political department of our government and was not within the province of the court to decide.

3. The court erred in discharging the writ of *habeas corpus*, thereby holding the existence of a treaty between the United States of America on the one part, and the Kingdom of Prussia or the German Empire on the other part.

4. The court erred in denying the right to introduce evidence for the purpose of showing that no extraditable offense has been committed.

5. The court erred in denying a prayer for a writ of *certiorari* in aid of the writ of *habeas corpus* heretofore issued, to bring the record from the United States commissioner to the District Court aforesaid.

6. The court erred in holding that the record before this court shows the commission of an extraditable offense.

THE LAW OF THE CASE.

In presenting the law of the case we are first confronted with the question:

Is the extradition treaty with Prussia still in existence or not?

In meeting this as well as any of the other errors assigned we are not in a position to follow the invariable course of preparing a formal answer, because, having had no access to their brief, we do not know in what manner counsel will now present the subject. We assume, therefore, that they will rely substantially upon the same elaborate arguments which they presented both in the District Court and in the Circuit Court of Appeals. There the question raised by counsel as to the validity of the extradition treaty of June 16, 1852, is placed in the foreground, and it is, indeed, the gist of the whole case, because, if this court should hold that the treaty is invalid, then the consideration of any of the other questions raised by counsel would become unnecessary, since it is freely conceded that appellant's extradition can only be effected by means of that treaty.

In their efforts to show that this treaty has become invalid by the creation of the German Empire in 1871 counsel argue substantially as follows:

> "The sovereignty over the Kingdom of Prussia is vested in the German Empire. The power of making treaties is vested solely in the sovereignty of independent nations, therefore, in order that extradition can be considered at all, an extradition treaty must exist between the United States and the German Empire, which is not the case. The treaty

of 1852 included most of the German States, but Baden and Bavaria had separate treaties, and with Lubeck, Hamburg and Alsace-Lorraine no treaty was ever made, nor did they accede to the treaty of 1852.

"Treaties are contracts between two or more sovereign states and obligatory upon nations as private contracts are upon individuals, subject to the same rules of construction as these.

"Extradition treaties are personal contracts calling for the reciprocal personal service of the contracting parties. The compliance with such provisions depends entirely upon the continued sovereign existence of both contracting parties. When sovereignty dies the treaty cannot be executed, but it is terminated. Personal executory contracts are terminated by the death of one of the contracting parties. Thus, also, if one of the contracting nations ceases to exist and its share of duties can no longer be performed, its treaties with the nations are terminated. According to international law the obligations of treaties expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things. Hence, if Prussia ceased to exist as an independent state the extradition treaty entered into with the United States in 1852 is terminated. If Prussia cannot now exercise all powers of independent sovereignty, *i. e.*, 'declare war, make peace, suppress insurrection, repel invasion, coin money, regulate foreign commerce and the admission to citizenship, *as well as to make treaties*,' then all her former treaties with foreign powers are *ipso facto* terminated. All this, counsel say, was effected by the formation of the German Empire, as shown by the preamble of its constitution and especially the following provisions contained in Art. 3 of that instrument, which [in George Bancroft's translation, to which reference will hereinafter be made more fully] reads as follows:

"'No German shall be limited in the exercise of

this privilege (the privilege of citizenship theretofore defined) by the authorities of his native state or by the authorities of any other state of the confederation.'

"The regulations concerning the care of paupers and their admission into the various parishes are not affected by the principle enunciated in the first paragraph.

"In like manner those treaties shall remain in force which have been concluded between the various states of the federation in relation to the custody of persons who are to be banished, the care of sick and the burial of deceased citizens.

"This, counsel say, makes it 'clear that the German constitution abrogated all existing treaties between the several states and other nations.' That this was the intent of the constitution, counsel insist, is very evident from that provision. 'The empire did not intend to endorse such treaties and consequently abrogated them.'

"The German emperor must represent the empire in international affairs, enter into alliances and other treaties with foreign nations and commission and receive embassadors. All powers incident to the sovereignty of an independent nation are lodged in the imperial government and the separate states are distinctly prohibited from exercising them. This includes Prussia, and since she can no longer make treaties her former treaties are void.

"The German states, counsel argue, therefore, are under precisely the same restraint with reference to the power of making treaties as the states of the American Union, and this being the case, it follows, in counsel's opinion, that all the old treaties must fail."

"The only treaty in question is that of 1852 and a number of other German states besides Prussia declared their accession to the same. Counsel ask: Can any person be extradited under said treaty who flees from one of those states who did not accede to it? The Kingdom of Wurtemberg is one of the states who did not become a party to the treaty. In

1866 the old German confederation was dissolved. In that same year a naturalization treaty was concluded between the United States of America and that kingdom and it was therein, among other things, provided:

"'The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the contracting parties the 16th of June, 1852, etc., remains in force without change.'"

Counsel, quoting this provision, say in all seriousness that by the same

"our own government, as well as that of Wurtemberg, treated the collapse of the German confederation as abrogating the treaty of 1852, claiming as counsel do, that the term 'remain' means 'revive' or 'renew.'"

From all this it appears to counsel that the treaty with Prussia

"is as much terminated as if Prussia had become a part of Great Britain in 1871."

They proceed:

"The North German Union was formed in 1867. The treaty of 1852 included twenty-seven German states and twenty-one of these were embraced within the North German Union. In 1868 the naturalization treaty was concluded between the government of the United States and the North German Union, and this contains the following provision:

"'The convention for the mutual delivery of criminals, fugitives from justice in certain cases, concluded between the United States on the one part and Prussia and other states of Germany on the other part on the 16th day of June, 1852, *is hereby extended to all the states of the North German Confederation.*'"

This, to counsel's mind, also clearly shows that the high contracting parties treated the extradition treaty as abrogated, for, why, counsel ask, was it necessary to renew its provisions?

Counsel then cite a number of cases to show that the political department of the government of the United States has at various times declared certain of its treaties with foreign states abrogated on account of their absorption by others, thus the treaty with Algiers, which was terminated as the result of French conquest, the treaties with Sardinia and the two Sicilies abrogated upon their becoming part of the Kingdom of Italy; and, to quote counsel's precise language:

> "All treaties concluded with the former Kingdom of Hannover and Nassau terminated in consequence of their incorporation of the Kingdom of Prussia in 1846 and 1856." Counsel then claim that Prussia was 'absorbed' by the German Empire in 1871 precisely as Hannover and Nassau were absorbed by Prussia, and that this alleged absorption of Prussia disposed of its international treaties as effectually as it did in the other instances. In concluding the discussion of this element of their case counsel ask, however: 'Can a treaty exist between an independent sovereignty and another state forming only a component part of another independent sovereignty (the German Empire), the latter not having even adopted such treaty, but by clear implication, at least, having annulled all such treaties by its original laws.'"

This "clear implication" they derive alone from the above section of the German constitution relating to existing treaties between the different states of the German Empire upon subjects wholly foreign to this controversy.

The questions raised in the above argument render it expedient to cast a brief retrospect into the political history of the German states and their relations to one another during the period within which the government of the United States has maintained treaty relations with them.

Aside from the intimate intercourse established between the government of the United States and the Kingdom of Prussia by the important treaty of amity and commerce concluded in 1785 and renewed with certain modifications in 1799, and again in 1828, diplomatic negotiations subsequently also became quite extensive between the government at Washington and the smaller German states. These states were at that time, including Prussia, all members of the so-called Germanic confederation created by the Congress of Vienna on the 8th of June, 1815. Art. II of the fundamental law of that confederation reads as follows:

> "The object of the confederation is the preservation of the external and internal security of Germany and of the independence and inviolability of the confederated German states."

There were imposed upon the states numerous restraints regarding the exercise of internal sovereignty, but in their peaceful diplomatic intercourse with foreign powers they remained fairly independent, although:

> "The Diet had power to establish fundamental laws for the confederation and organic regulations as to its foreign, military and internal relations."

See Lawrence's Wheaton, Elements of International Law, p. 80.

No American minister had been accredited at any of the courts of the German states since John Quincy Adams

had represented our government at Berlin from 1797 until 1801. But owing to the rapid political and industrial growth of Prussia, our government, in 1835, reestablished the post of minister at said court, and in order that no opportunity should be lost to cultivate with that country relations of mutual interest, sent our great American jurist, Henry Wheaton, as its representative. During his residence at Berlin, extending over a period of eleven years, Mr. Wheaton, under instructions from the state department, concluded with a number of the German states, Bavaria, Wurtemberg, Saxony, Hannover, Hesse-Cassel and Nassau, a series of treaties which had for their object chiefly the surrender of the *droit de detraction* and the *droit d' aubaine,* so extensively practiced at that time by most all the states on the continent of Europe. Concerning those treaties Mr. Wheaton wrote to the Secretary of State May 14, 1845, as follows:

> "The tax imposed on the funds removed by emigrants, who leave this country (Germany) amounts in Saxony and most of the German states to ten per centum on the capital thus transferred. This amount is so much clear gain to us in the capital thus brought into the country by the rich peasants and others, who sell their real property here and emigrate in great numbers to the United States. The *droit d'aubaine* is equally oppressive, subjecting to a like duty all property, which emigrants to the United States might derive on the death of relatives in the country of their origin; and the duty imposed in such cases is also, in general, ten per cent. on the capital."

It is evident that these treaties, which to this very hour are held by both sides, the German governments and the government of the United States, to be in full force, have

been of incalculable benefit to our country. When they were negotiated the very framer, our most celebrated American teacher of international law, notwithstanding the contention of counsel that a state, in order to be able not only to make, but also to maintain, a treaty, must at all times be in the full possession of all the attributes of sovereignty, was evidently wholly unconcerned as to which of these attributes had been taken from the German states and transferred to the Germanic Confederation, so long as he was satisfied that these states were not deprived of the prerogative to regulate the subject of taxation for their citizens and to waive the same by solemn international compact in favor of emigrants. And yet the great German jurist, Professor Mittermaier, of Goettingen, was wont to say to his class of students concerning the author of these treaties:

> "And first of all, young gentlemen, I give you the name of the great American writer, Mr. Wheaton, the best authority in any language on the subject of International Law."

How unmindful, in the eyes of counsel, must these two learned teachers have been of the cardinal principles regulating the making and maintaining of treaties.

If counsel's argument to the effect that the extradition treaty with Prussia concluded in 1852, when that state was a member of the Germanic Confederation, has become invalid on account of the formation of the German empire, is worth anything at all, then it necessarily follows that Mr. Wheaton's beneficent treaties with the other German states, likewise formerly belonging to that confederation and now members of the same empire, also fall to the ground.

The war between Austria and Prussia in 1866 resulted in the total extinction of the Germanic Confederation. Prussia conquered the kingdom of Hannover, the electorate of Hesse-Cassel, the grandduchy of Nassau and the free imperial city of Frankfort, completely effaced their independent governments, and reduced them to provinces of her own kingdom. Having thus become absolutely extinct and being wholly deprived of any and all organs through which international treaty obligations could be carried out, and diplomatic intercourse maintained, it naturally followed that their compacts with foreign nations were ended.

Upon the ruins of the Germanic Confederation, Prussia, in the same year, erected the North German Union, of which twenty-one independent German states became members. As regards this creation, Mr. Seward, as secretary of state, wrote under date of December 9, 1867, to George Bancroft, our minister at Berlin, among other things, as follows:

> "It shows that upon due consideration you have decided to recognize officially, not only the Prussian parliament, but also the parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount constitution of the North German United States, the King of Prussia, to whom you were accredited, is at the head of those several organizations or institutions. This decision is entirely approved."

See Message and Documents, Dept. of State, Part 2, p. 40.

It has never been claimed by any sane person that on account of the formation of the North German Union and the adoption of a constitution for that body, Prussia

was absorbed and became extinct, and yet her relations to that Union were very much the same as those subsequently established and now maintained between her and the German Empire.

Shortly after his appointment as minister Mr. Bancroft resumed with the government of the *North German Union* the negotiations which his predecessor, Mr. Joseph A. Wright, had opened with the *Kingdom of Prussia* for the perfection of a naturalization treaty between our government and said Union, in order to remove from the diplomatic intercourse between the two powers the frequent controversies relating to compulsory enlistments of naturalized American citizens of German birth upon returning for a brief visit to their native homes, and it is due to the great diplomatic skill of the American minister that the treaty was finally, to wit: on February 22, 1868, concluded between his government and *the North German Union*. Article III of that treaty, which provides that the convention for the mutual delivery of criminals of the 16th of June, 1852, shall be "extended to all the states of the North German Confederation," proves not, as counsel claim, that the parties to the treaty regarded it as abrogated by the formation of that Union, but the very opposite, for else the high contracting parties would not have said that it shall be *extended*, but that it shall be *revived* or *renewed*. The fact is that all the members of the North German Union were parties to the extradition treaty with Prussia, except the two Hanseatic republics of Hamburg and Lubeck, and the intention of the two contracting governments therefore clearly was to have these countries also embraced within that compact.

The North German Union was incorporated into the German Empire by the adoption of the German constitution in April, 1871. When this happened, then, according to counsel's logic, not only Mr. Wheaton's treaties, but also this naturalization treaty, must have been wiped out, although the statesmen charged with its strict observance and at the head of affairs in Washington and in Berlin have at all times studiously preserved its integrity. The reason why this treaty is still in existence is obvious. It is plainly pointed out in the passage above quoted from Secretary Seward's letter to our minister. The King of Prussia, who was declared to be the chief executive of the North German Union and in the possession of the necessary powers of government to carry into effect all its international obligations, as well as his Kingdom, are still in existence. We shall presently see that the language of Mr. Seward, "that by the paramount constitution of the North German Union the King of Prussia is at the head of the several German organizations or institutions," applies with equal force to the political conditions established by the states in erecting the German Empire.

After the Franco-German war in 1871 all the different states which had theretofore constituted the Germanic Confederation, with the exception of Austria, entered into a voluntary alliance under the leadership of Prussia and gave it the name of the German empire. We shall presently quote from the constitution of that empire, found on pp. 383 *et seq.*, in the Volume of Foreign Relations of the United States for the Year 1871, those passages which relate to the subject-matter under discussion.

In the official promulgation of that constitution by the "German Emperor, King of Prussia," as he styles himself, it is especially recited:

> "Instead of the constitution of the Germanic Confederation adopted by the North German Union, etc., etc., the following constitution for the German Empire is adopted."

The preamble of the German constitution reads as follows:

> "His Majesty the King of Prussia, in the name of the North German Union, His Majesty the King of Bavaria, etc., etc., conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people."

Articles 2 and 5 (Div. II.) relate to the legislation of the Empire and after reciting (Art. 2), that

> "within this territory the Empire shall have the right of legislation according to the provisions of this constitution, and the laws of the Empire shall take precedence of those of each individual state, etc.,"

it is, among other things (Subdivision 13 of Art. 4), provided that the federal legislation shall extend to

> "the law of obligations, *criminal law*, commercial law, and the law of exchange, likewise to judicial procedure."

Article 6 provides:

> "The federal council (the upper chamber of the German parliament) shall consist of the representatives of the states of the Confederation, among whom the votes shall be divided in such a manner that Prussia (including Holstein, Hannover and the other territory acquired by conquest in 1864 and 1866) shall have 17 votes; Bavaria, 6 votes, etc., etc. Each member of the Confederation shall appoint as

many delegates to the federal council as it has votes; the total of the votes of each state shall, however, be cast by one delegate."

It appears, therefore, that the upper house, appointed as it is by the executive authority of each one of the several German states and its votes being cast not by individuals as such, but by states, bears a striking resemblance to the constitution of the American Congress under the Articles of Confederation.

Article 7 provides in what cases the federal council shall take action, in substance, concerning:

"1. The measures proposed to the diet (the lower house of parliament) and the resolutions passed by the same.

2. The general provisions and regulations necessary for the execution of the laws, etc.

3. The defects which may be discovered in the execution of the laws, etc."

Under Art. 8 the federal council shall divide itself into eight committees, each to have under its special care a certain subject of federal legislation, and in each committee at least four states of the Confederation shall be represented.

Art. 9 confers upon each member of the federal council the right to appear in the diet at any time and be heard there, in order to represent the views of his state.

Under Art. 10 "the Emperor shall afford the customary diplomatic protection to the members of the federal council," who, it appears from other provisions, are regarded as the plenipotentiaries of their respective states.

Art. 11 (Div. IV.):

"The King of Prussia shall be the President of the Confederation and shall have the title of German Emperor. The Emperor shall represent the

Empire among nations, declare war, and conclude peace in the name of the same, enter into alliances and other conventions with foreign countries, accredit embassadors, and receive them. For a declaration of war in the name of the Empire the consent of the federal council shall be required, except in case of an attack upon the territory of the Confederation or its coast."

"So far as treaties with foreign countries refer to matters which, according to Article 4, are to be regulated by the legislature of the Empire the consent of the federal council shall be required for their ratification, and the approval of the diet shall be necessary to render them valid."

The other powers delegated by the constitution to the King of Prussia as German Emperor bear no relation whatever to the matters in issue.

Articles 20-32 (Div. V) determine the composition of the diet, the election of its members by universal suffrage, its sessions, mode of dissolution and the rights of members.

Art. 56 (Div. X):

"The Emperor shall have the supervision of all consular affairs of the German Empire, and he shall appoint consuls, after hearing the committee of the federal council on commerce and traffic."

"No new state consulates are to be established within the jurisdiction of the German consuls. *German consuls shall perform the functions of state consuls for the states of the Confederation not represented in their district, etc.*"

We quote these last two provisions to show that by the very terms of the German constitution the consuls appointed by the Empire are distinctly recognized as the consuls of the different states of the Confederation.

The remaining paragraphs, relating as they do to customs and commerce, the railways, mails and telegraph,

marine and navigation, the army, the finances, punishment of offenses committed against the integrity of the Empire, etc., and the mode of amending the constitution, are wholly foreign to the matters in issue, and the above quotations are all the provisions which concern the same in the remotest degree. Nowhere in the entire constitution can any provision be discovered which, either in express language or by implication, contains the remotest reference to the former diplomatic relations of any one of the different states of the Confederation, or to their international treaty obligations; nor can in any one of the enumerated powers delegated to the federal government by the states composing the Confederation a single passage be found from which it could be inferred that they intended to part or did part with any one of those attributes of internal sovereignty which comprise the organs of government necessary to render to the United States of America or to any other government, to whom they bear similar relations, the personal service required of them under the conventions concluded by them for the mutual surrender of criminal fugitives. Neither the written constitution of the Kingdom of Prussia nor the internal integrity of said Kingdom has been in the least affected by its entering into the voluntary compact for the formation of the German Empire. It still maintains its independent judiciary and its police, as well as its ministers who carry out the decrees of the King relating, among other things, to the faithful observance of international obligations.

But counsel contend that the provision of Art. 3 by which those treaties concluded before the adoption of the constitution between the various states of the federation "in relation to the custody of persons who are to be ban-

ished, the care of sick, and the burial of deceased citizens," are to remain in force,

> "makes it clear that the German constitution abrogated all existing treaties between the several states and other nations. * * * The empire did not intend to endorse such treaties and consequently abrogated them."

This argument is striking. Counsel invoke the maxim, that international treaties are to be treated like contracts between individuals, subject to the same rules of construction. The passage quoted is silent as to any and all treaties concluded between the separate German states and foreign governments. This silence alone, in the eyes of counsel, suffices to condemn all such treaties. Let us illustrate counsel's logic by an example from the ordinary affairs of life: A and B enter into a contract with each other to carry on a joint venture. Each of them, independent of the other, is long since bound to perform certain service under stated conditions, the one to C the other to D. In their present agreement A and B say nothing about these obligations to third parties, and the third parties are not taken into their counsels with reference to the same. This, according to counsel's remarkable discovery, is sufficient to absolve them of all obligations under their separate contracts with C and D. Such logic, coming from members of the legal profession, is simply astounding.

The separate German states are doubtless under old treaty obligations with other governments besides our own. It is not known that any of these obligations have ever been disregarded and in the case of the United States it is conceded by the political department of its government that they have at all times been faithfully fulfilled.

It never occurred to any one of the German statesmen and jurists, not even to those who were instrumental in framing the German constitution, that in discharging those obligations, their state governments performed wholly idle acts of supererogation, because, after a lapse of thirty years, it has at last been discovered by counsel for a criminal fugitive from the justice of one of their states, that their federal constitution wiped out those treaties, that they were wholly ignorant of its true spirit and that, when they framed that instrument, they really did not know what they were doing. And our American statesmen in charge of the State Department at Washington will be no less surprised at the wonderful discovery that the extradition treaty with Prussia is abrogated, not because it expired by its terms, not because the honor or interest of any one of the parties thereto has prompted its annulment, not because Prussia has at all violated it or has shown the slightest unwillingness to carry it out, but simply because the government of that country has agreed with several outsiders (the other parties forming with it the German Empire) that certain relations pending between them and wholly foreign to the subject-matter of the treaty in question shall in the future be maintained between them as they were in the past. It must be admitted that a proposition to throw up a solemn agreement between two respectable governments with such *abandon* as this has never been submitted to a court of justice before.

Every government has the power, so long as the same has not been voluntarily relinquished, or forcibly taken away by others, to contract treaties concerning all those subjects which are within the scope of its internal sovereignty, however limited this may be,

and in this sense the American government has never, within these limits, hesitated to treat with the Indian tribes within its boundaries, although they never had the sovereign right "to declare war, coin money, regulate foreign commerce, etc., etc.," all of which counsel insist are prerequisites to the power of making any kind of treaties, but have always been regarded solely as subjects and the wards of the nation. Nor are treaties abrogated, as is claimed, simply because a state voluntarily transfers one or more attributes of its sovereignty to an ally. Were this the case it might as well be claimed that a business man is exonerated from his contractual obligations simply because he has placed a certain branch of his business in charge of an overseer or a copartner.

In international law neither an alliance nor a change of government has ever been treated as sufficient to abrogate international treaties.

We believe we have hereinabove sufficiently shown that the alliance which Prussia has formed with the other German states in establishing the German Empire has not had the slightest effect upon her international treaty obligations. We will, therefore, now consider the next error assigned.

Did the District Court err in holding that the question of the existence of a treaty is not within the province of the courts to decide, but should be determined by the political department of the government?

In regard to this point we first beg to refer to the notes of Mr. J. C. Bancroft Davis accompanying the State Department's compilation of Treaties and Conventions between the United States of America and other powers

since July 4, 1776, published in 1889. Mr. Davis (p. 1234) has this to say concerning

"Treaties with Powers that have been absorbed into other nationalities: Algiers: Treaties of 1795, 1815 and 1816, French jurisdiction extended by conquest in 1830 over Algiers, and consuls are acting there under French exequaturs; *Hanover: Treaties of 1840, 1846, 1855 and 1861.* All the treaties with Hanover are regarded as having terminated in consequence of its conquest and incorporation into the Kingdom of Prussia in 1866; Nassau (treaty of), 1846. Prussian jurisdiction was extended over Nassau by conquest in 1866.

The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the states composing the Empire. It cannot be said that any fixed rules have been established.

Where a state has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

Where no new treaty has been negotiated with the Empire, the treaties with the various states which have preserved a separate existence have been resorted to.

The question of the existence of the extradition treaty with Bavaria was presented to the United States District Court, on the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas corpus*, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

Such a question is, after all, purely a political one."

By way of parenthesis we wish to remark that, if there is a faint touch of uncertainty contained in the foregoing statements as to whether the extradition

treaties with the German states should not have been replaced by a treaty with the Empire, their continuous validity has assuredly long since been placed beyond all doubt by the political departments of all the governments concerned in them and mutual extradition has been effected under them without interruption. So far as the Kingdom of Prussia is concerned it ha. permitted no question to arise as to its treaty with the United States being binding on it. In June, 1889, the Foreign Office of the German Empire promulgated its "Memorandum relating to the procedure on International Extradition employed by the German Empire and the Kingdom of Prussia," which stands in place and has the force of statutory enactments. We quote from the same the following passages contained on p. 726 (under Par. 469) of Vol. 1, Moore on Extradition:

> "In so far as by laws and treaties of the empire relating to the extradition of criminals, provisions which bind all the states of the union have not been made, those states are not hindered from independently regulating extradition by agreements with foreign states or by laws enacted for their own territory.
>
> "Of conventions, some of an earlier, some of a later period, for the extradition of criminals, entered into by individual states of the union with various foreign states, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the states of the former North German Union, and also to Hesse, south of the Main, and to Wurttemberg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively."

This shows conclusively not only that Prussia has at all times been ready and willing to carry out the obligations devolving upon it under its extradition treaties with foreign powers, but that the German Empire itself recognizes that the obligations arising under the former treaties of the several states are still binding upon them.

This should set the matter at rest once for all.

But let us see whether Mr. Davis is not perfectly right in declaring that the question whether a treaty is still in existence or not "is purely a political one." If he is, then his declaration carries with it the plain inference that the willingness or ability of the parties to a treaty to carry it out can alone be determined by the political department of the government. By the constitution of the United States the President has the power, by and with the advice and consent of the Senate, to make treaties. He is authorized to appoint ambassadors, other public ministers and consuls, and to receive them from foreign nations. Thus he is enabled to obtain accurate information of the political condition of the nations with which he treats, what powers of sovereignty they exercise and whether any limitations are placed upon that sovereignty which may affect the faithful fulfillment of international treaty obligations. The President, therefore, and the Department of State are the only proper organs of the government of the United States to ascertain and determine whether any state with whom treaty relations have been once established has either violated them or has lost its individual existence so as to be unable to observe them.

In *Doe* v. *Braden*, 16th Howard, 635, it was urged, among other things, before this court, that the King of Spain had not the power to annul a certain land grant

to the duke of Alagon, as he did by the treaty of February 22, 1819, by which Florida was ceded to the United States, but that this power existed alone in the Spanish Cortes, and that hence at least that part of the treaty by which the grant was annulled was void. The court disposes of this point in the following words:

> "The constitution declares that all treaties made under the authority of the United States should be the supreme law of the land."
>
> "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered."
>
> "Nor can the plaintiff's claim be supported unless he can maintain that a court of justice may inquire whether the President and Senate were not mistaken as to the authority of the Spanish monarch in this respect; or knowingly sanctioned an act of injustice committed by him upon an individual in violation of the laws of Spain. But it is evident that such a proposition can find no support in the Constitution of the United States, nor in the jurisprudence of any country where the judicial and political powers are separated and placed in different hands. Certainly no judicial tribunal in the United States ever claimed it or supposed it possessed it."

If, therefore, it is not proper, as the court here holds, for the courts of the country to inquire and decide whether the person who ratified the treaty on behalf of a

foreign nation had the power to make the engagements into which he entered, it follows as a necessary corollary that not the courts, but the political and legislative departments of the federal government, having once entered into treaty stipulations with a foreign state, are alone competent to determine whether the power remains in that state to carry out the obligations prescribed by the treaty or not. And if, as this court also rules, the courts of justice have no right to inquire whether the President and Senate were not mistaken as to the authority of the organs of a foreign government with whom a treaty is concluded, it would likewise appear to be plain that the question whether the President and the Department of State may not be mistaken in assuming that a treaty, once concluded with a foreign power, remains still in full force and effect, is as effectually withdrawn from the jurisdiction of our courts as the first.

In *Foster* v. *Neilson*, 2 Pet., 314, the question arose whether the clause in the same treaty between the United States and Spain in which it was stipulated by the former "that all grants of land made, etc., by his Catholic Majesty, etc., shall be ratified and confirmed to the persons in possession of the lands, etc.," operated on the titles of the lands or not. Mr. Chief Justice MARSHALL decided as follows:

> "Our constitution declares a treaty to be a law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department."
>
> "The judiciary is not that department of the gov-

ernment to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established."

In *Taylor* v. *Morton*, 2 Curtis, 455, it is held that:

"A promise in a treaty, that the products of one country shall not be subjected to a higher rate of duty than like products imported into the United States from other countries, addresses itself to the political and not to the judicial department of the government, and the courts cannot try the question whether it has been observed or not."

The court says further:

"Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to the act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them, but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws. And it necessarily follows that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere in our system of government."

The doctrines here enunciated have been uniformly followed by the ablest appellate tribunals of the different states of the Union. Thus in *Maiden* v. *Ingersoll*, 6 Mich., 376, in which it was claimed that the power of the

Pottawatomie Indians to cede certain lands in the State of Michigan by treaty, as had been done by them, could be questioned by the courts, the Supreme Court of that state holds as follows:

> "When a treaty has been made by the proper federal authority and ratified, it becomes the law of the land, and the courts have no power to question, or in any manner look into, the powers or rights of the nation or tribe with whom it is made. The action of the treaty making power is conclusive upon such inquiry."

We do not wish to encumber this brief with any further quotations in relation to such self-evident propositions. Indeed, no court in the land has ever, in opposition to the executive and legislative branches of the government, declared a treaty to be inoperative or void on account of any act or default of the other party to it. To do so would be a wholly unwarranted interference with those branches of the government to whom the power of making treaties is specially intrusted by the Constitution. Hence in all cases which have ever arisen in this, or other courts in the land, and in which international relations have been at stake, it has been invariably held that they must be determined in the first place by the legislative and executive departments of the government, and as these departments view them, so must the courts view them.

In the above quotation from Mr. Davis' notes, reference is made to the case decided in 1874 in the Southern District of New York, and in which the validity of the extradition treaty with Bavaria was called in question for the same reason that that kingdom had become part of the German Empire. This was the case of Thomas, a fugitive from the justice of said kingdom, charged with

forgery. The court disposed of the objections raised against the treaty as follows:

> "It is further contended, on the part of Thomas, that the convention with Bavaria was abrogated by the absorption of Bavaria into the German Empire. An examination of the provisions of the Constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several states composing the confederation called the German Empire, and foreign countries, were annulled or to be considered as abrogated."
>
> "Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being in such case not absolutely void, but voidable at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. (1 Kent's Com., 174.) In the present case the mandate issued by the government of the United States shows that the convention in question is regarded as in force, both by the United States and by the German Empire, represented by its envoys, and by Bavaria, represented by the same envoy. The application of the foreign government was made through the proper diplomatic representative of the German Empire and of Bavaria, and the complaint before the commissioner was made by the proper consular authority, representing the German Empire and also representing Bavaria."
>
> *In re* Thomas, 12 Blatchford, pp. 379 and 380.

Counsel, referring to this case, speak about it in their printed briefs filed in the court below as follows, to wit:

> "It seems to us that the court missed the point under discussion entirely. There is here no ques-

> tion of abrogation or violation of treaties. The question here is, does the *disappearance* of a treaty-making, independent sovereignty carry with it the treaties theretofore made? Can a treaty exist between an independent sovereignty and another state, forming only a component part of another independent sovereignty, the latter not having even adopted such treaty, but by clear implication at least, have annulled all such treaties by its organic law?"

We believe we have already clearly shown the absurdity of these assertions. The question so wantonly raised in the case at bar is a serious one. As we have already pointed out, it does not only involve the validity of the extradition treaty with Prussia and a number of other German states, but it applies alike to the treaty of friendship concluded with that country in 1828; to a similar treaty with the Hanseatic republics of 1827; to all the Wheaton treaties; to the extradition treaty with Bavaria of 1853 and to that with Baden of 1857; to the several naturalization treaties with Bavaria, Wurttemberg, Baden, Hesse-Darmstadt and the North German Union concluded in 1868; as also to the conventions patterned after the Wheaton treaties with Mecklenburg-Schwerin and Oldenburg in 1847 and with Brunswick-Luneburg in 1854. In short, if counsel are correct, then all the treaties which for a period ranging from more than thirty to nearly a hundred years have so happily aided in cementing the peaceful and intimate intercourse between two great nations and which the statesmen on both sides of the Atlantic, who have been concerned in them, have in all seriousness treated at all times, to this very day, as valid and of binding force, are rooted out with one fell stroke.

But in this very case we should not omit to mention the undeniable fact that counsel for the fugitive, not satisfied with bringing the question into the courts, have also submitted to the Department of State all they are able to say on the subject of this treaty. They have there likewise been given a very patient hearing, both upon the facts and the law of the case, and, as a matter of courtesy, were granted quite an extension before final action was taken upon the record of their client's guilt returned by Commissioner Foote. And the State Department, taking upon full consideration the same view of the matter as did the court below, has rejected counsel's arguments against the treaty as worthless and has issued the warrant for the extradition of counsel's client, deliberately certifying therein that the requisition for the delivery of Gerhard Terlinden to the Prussian authorities has been made and granted upon proof

> "in conformity with the provisions of existing treaty stipulations between the United States of America and Prussia and other states of the Germanic Confederation for the mutual delivery of criminals, fugitives from justice in certain cases, etc."

Extradition treaties have become universal among the civilized nations of the world. Designed as they are to prevent in this age of rapid transit the easy escape of criminals from one country to the other, their integrity and faithful observance are demanded by sound policy and good morals. International obligations based upon mutual compacts of every character are held to be sacred by every self-respecting nation so long as its interest and its honor do not demand their abrogation, and this applies with particular force to treaties under which fugitive criminals are to be delivered up to the justice

of the country from which they have fled. Counsel say they "do not claim that either party has violated the provisions of the treaty with Prussia," but they contend that

> "the treaty has been dissolved, terminated by operation of the law, in this case by operation of International Law."

This is, to say the least, a very strange view of International Law. Counsel evidently look upon it in the light of a positive rule of action prescribed by a superior power and to which everybody concerned owes strict obedience. This is a fatal error. Wheaton says:

> "International Law, as understood among civilized nations, consists of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent."

If, therefore, International Law ever was what counsel claim it to be, which, however, must be denied, then it is highly creditable to the two nations concerned in the extradition treaty under discussion, that their enlightened governments have modified that law so as to make it consonant to reason and justice.

HAS THE CRIMINAL LAW OF PRUSSIA BEEN VIOLATED?

In connection with the discussion relating to the existence of the treaty, counsel also assert that the commissioner lacked jurisdiction, because the fugitive is sought to be extradited to Prussia, whereas, as they say, the criminal laws of Germany and not those of Prussia were violated, since (according to their contention) Prussia has no criminal laws. This position is, to say the least, unique. By the constitution of the German

Empire (Art. 4, Subd. 13) the power to pass uniform criminal laws for the entire territory of the federation was delegated to the central government, and accordingly a uniform criminal code was enacted in 1872, but these laws are administered on Prussian soil by Prussian courts, who pronounce sentence in the name of the King of Prussia, and such laws are none the less the laws of Prussia and of each individual state, because they emanate from a central body. The law of the whole land is the law of every part. *Omne majus continet in se minus.*

But this question is not even material. Neither the treaty in question nor the Acts of Congress in relation thereto make any requisition upon the foreign government concerning the mode in which it shall enact its criminal statutes or the source from which it shall derive the same. The treaty provides in substance:

> "It is agreed that the United States and Prussia shall upon mutual requisitions, etc., etc., deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, etc., or forgery, or the utterance of forged papers, etc., committed within the jurisdiction of either party, shall seek an asylum or shall be found within the territories of the other, etc."

Sec. 5270 (Title LXVI) of the Revised Statutes of the United States reads as follows:

> "Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, etc., may upon complaint under oath, charging any person found within the limits of any state, district or territory with having committed within the jurisdiction of any such

> foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of any person so charged, etc."

If then it is properly set forth in the complaint, as is the case, that the crimes were committed "within the territory," or "within the jurisdiction" of the Kingdom of Prussia, then the complaint is sufficient under the treaty and the law to form the basis of extradition proceedings and upon proper showing before the commissioner, to warrant a fugitive's extradition, no matter whence the demanding government derived its laws.

DID THE COURT ERR IN DENYING THE RIGHT TO INTRODUCE EVIDENCE FOR THE PURPOSE OF SHOWING THAT NO EXTRADITABLE OFFENSE HAS BEEN COMMITTED?

The petition for the writ of *habeas corpus* was filed before any evidence was taken before the commissioner.

It has been universally held that the question of a prisoner's guilt or innocence must, after indictment, be submitted to a jury. It cannot be tried on *habeas corpus*.

See:

People v. *McLeod*, 1 Hill, 377.
Carcemi v. *People*, 18 N. Y., 129.
People v. *Ruloff*, 5 Park C. Rep., 77.
People v. *Richardson*, 18 How. Pr., 93.

In the case of *ex parte Crouch*, 112 U. S., 178, the court holds:

> "The office of a writ of *habeas corpus* is neither to correct errors of the court below, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed."

"The question of the guilt or innocence of the prisoner is not to be considered on an inquiry of this character."

In re Reynolds, 20 Fed. Cas., 609.

"The court on *habeas corpus* will inquire only into the jurisdiction of the inferior court, either in regard to the subject-matter or the person.

In re Mayfield case, 141 U. S., 107."

"The writ brings up the body of the prisoner and the cause of commitment; the court can inquire into the sufficiency of that cause, but if it is the judgment of a court of competent jurisdiction, that judgment is of itself sufficient cause."

In re Watkins, 3 Pet., 193.

Counsel rely on Sec. 761 of the Revised Statutes, which provides that the court issuing the write of *habeas corpus* shall determine the facts in the case, by hearing the testimony and arguments, asserting that this section makes it the duty of the judge to hear evidence relating to the prisoner's guilt or innocence and virtually to take the case out of the hands of the commissioner. That this is not the meaning of the section is evident from numerous cases decided by this court subsequent to its enactment, and in which the right of the court issuing the writ of *habeas corpus* to look into the evidence of the prisoner's guilt or innocence is expressly denied.

Horner v. *United States*, 143 U. S., 207.
Oteiza v. *Jacobus*, 136 U. S., 330.
Stevens v. *Fuller*, 136 U. S., 468.
Ornelas v. *Ruiz*, 161 U. S., 502.
Ex parte Bryant, 167 U. S., 104.

In *Ornelas* v. *Ruiz*, 161 U. S., 502, 508, Mr. Chief Justice FULLER, in delivering the opinion of the court, says:

> "By repeated decisions of this court it is settled that a writ of *habeas corpus* cannot perform the office of a writ of error, and that in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*."

If, then, it is good law that the court will not review the evidence before a commissioner in a case of this kind, it can certainly not be good law for the court to take the evidence out of the hands of the commissioner, hear the case itself and determine the issues after the commissioner has acquired jurisdiction.

In the case of *Benson* v. *McMahon*, 127 U. S., 457-463, this court says:

> "We are not sitting in this court on the trial of the 'prisoner with power to pronounce him guilty and punish him, or declare him innocent and acquit him.'"

Petitioner's motion to have the District Court hear the testimony was therefore properly denied.

3. DID THE DISTRICT COURT ERR IN DENYING APPELLANT'S PRAYER FOR A CERTIORARI IN AID OF THE WRIT OF HABEAS CORPUS?

The record in this case shows that the prisoner in his petition for the writ, in addition to the objection he raised against the treaty, relied alone upon the complaint filed

with the commissioner and the warrant issued thereon. He prosecuted his writ pending the proceedings before the commissioner and before any testimony was introduced. Copies of the complaint and warrant were attached to the petition and admitted by the respondent to be correct. Hence there was no need for the writ of *certiorari*.

But we also wish to urge that this writ is never granted before the final determination of the case pending in the lower court, whose record is called for.

> "The writ is necessarily founded on a final determination. Were the rule otherwise, a writ might issue at any step in the proceedings of the interior tribunal, although such tribunal might, were the points presented to it, decide it had no jurisdiction in the matter submitted to it. This would be the exercise of original jurisdiction by the court issuing the writ, and not a review of the determination of the inferior tribunal. The matter complained of would be, not that the tribunal had exceeded, but that it was about to exceed its jurisdiction."
>
> "The writ of *certiorari* is a writ of review."
>
> *People* v. *County Judge*, 40 Cal., 479.
> *People* v. *Lindsay*, 1 Idaho, 374.
> *Stokes* v. *Early*, 45 N. J. L., 478.
> *Ex parte* Hamilton, 58 How. Pr., 290.
> *Noble* v. *Board of Pilots*, 37 Barb., 120.
> In the case of the Road, 2 S. & R., 419.

But in their printed briefs filed in the United States Circuit Court of Appeals for the Seventh Circuit, counsel say as follows:

> "The *petition of appellant* for the writ of *certiorari* shows that the purpose of the application was to bring to the notice of the court copies of the *original warrant of arrest filed in the courts of Ger-*

> *many.* The importance of these records is readily apparent when it is remembered that it was the contention of appellant that said original warrants so filed in the German courts, *did not show the commission of an extraditable offense by him,* even if an extradition treaty was in force. Therefore, we submit that the court erred in denying the petition for the writ of *certiorari* to the commissioner for the purpose of sending up the record to said District Court."

It is evident from appellant's own sworn statement contained in his "traverse," as we have already pointed out, that he had it as much in his power to bring before the district judge "copies of the original warrant of arrest filed in the courts of Germany," as to produce what he claims to be a copy of the depositions filed with the complaint. The one was part of the other, as is shown by the German Consul's complaint from which he quotes, and why appellant should produce only copies of these depositions, which he also well knew formed but a small part of the testimony against him, but not the copy of the warrant, he and his counsel can best explain themselves.

The motion to "stay all further proceedings before the United States commissioner," which the court very properly denied (Rec. p 56), was likewise wholly out of place. All the proceedings before the commissioner, pending the inquiry upon the writ of *habeas corpus,* were conducted with the express consent and approval of the district judge.

The court did not err in denying the writ of *certiorari.*

DID THE COURT ERR IN HOLDING THAT THE RECORD SHOWS THE COMMISSION OF AN EXTRADITABLE OFFENSE?

As we have heretofore submitted, the question as to what the "record" showed in regard to the commission of the offense by the prisoner was not a proper subject for the decision of the District Court. It was its duty, however, to determine whether the complaint on which the warrant issued properly charged an extraditable crime, *i. e.*, the crimes of forgery and uttering forged papers.

The complaint in this case charges with great minuteness a large number of extraditable crimes, each of them distinct enough to be fully recognized as such, and constituting forgery at common law as well as under the statutes of the different states of the Union. The crimes complained of are:

1. The forging and uttering of a large block of stock certificates of the Gerhard Terlinden Stock Company.

2. The forging of the revenue stamp of the German government employed by the Royal Prussian Revenue Office.

3. The forging and uttering of a number of draft acceptances.

In the case of *Benson* v. *McMahon*, 127 U. S., 457, this court has said:

> "We do not see that in this application to set the prisoner at large, after he has been once committed by an examining court having competent authority, and after having been held in Mexico for the offense charged, this court is bound to examine with very critical accuracy into the question as to whether

> or not the act committed by the prisoner is technically a forgery under the common law. Especially is this so when the wickedness of the act, the fraudulent intent with which it was committed and the final success by which the fraud was perpetrated, are undoubted."

This language is cited with approval by this court in the case of *Oteiza* v. *Jacobus*, 136 U. S., 330.

In this view of the matter we submit to this court the provisions from the German Criminal Code, which the prisoner is charged by the Prussian Court at Duisburg, before whom this case is pending, with having violated, and which are contained in the warrant of arrest issued by the court. This warrant, duly authenticated by the United States embassy in Berlin, was attached to those depositions which we filed with the commissioner, before the writ of *habeas corpus* was issued, and as we have above pointed out, appellant's counsel did not see fit to submit to the court below with their so-called "traverse" a copy of said warrant and of said penal provisions. These provisions are as follows:

> "Par. 267. Whoever with unlawful intent forges or counterfeits a domestic or foreign public instrument or such a private instrument as may be of importance for the purpose of proving rights or legal relations, and makes use of the false for the purpose of deception, is punishable with imprisonment for forgery of instruments.
>
> "Par. 268. Forgery of an instrument made by any one with the intent of obtaining for himself or another a pecuniary gain, or to inflict injury upon another, is punishable as follows:
>
> "1. When the instrument is a private instrument, with imprisonment in the penitentiary up to five years, besides which a fine not exceeding three thousand marks may be imposed.

"2. When the instrument is a public instrument, with imprisonment in the penitentiary for a term not exceeding ten years, besides which a fine of from one hundred and fifty to six thousand marks may be imposed.

"In case of mitigating circumstances imprisonment in the common jail will take place, which, in the case of forgery of a private instrument, shall be not less than one week, and in case of forgery of a public instrument, not less than three months.

"In addition to the imprisonment, a fine not exceeding three thousand marks may be imposed.

"Par. 270. It is treated as equivalent to forgery of an instrument in case anybody makes use of any forged or altered document, knowing the same to be forged or altered, with intent to deceive.

"Par. 146. Whoever counterfeits inland or foreign coin or paper money for the purpose of using such counterfeited money as genuine or otherwise to put it in circulation; or who, with like intent, gives to genuine money, by alteration made upon the same, the appearance of higher value, or gives to invalidated money the appearance of money still current, shall be punished with imprisonment in the penitentiary for not less than two years. Police surveillance is also admissible. In the case of mitigating circumstances imprisonment in the common jail may be provided.

"Par. 149. Certificates of indebtedness made payable to the holder, bank notes, stock certificates or preliminary certificates or receipts taking their place, as well as coupons and dividends or renewal certificates thereto belonging, which may be issued by the Empire, the North German Confederation, a state of the Confederation, or a foreign state, or by any other community, corporation, company or private person authorized to issue such papers, are deemed equivalent to paper money.

"Par. 147. The same penalty extends to all persons who circulate the money counterfeited or altered by them with the above mentioned intent, and also to such persons who obtain counterfeited

> or altered money and either utter the same or bring the same from abroad with the intent of circulating the same."

Under either our American or the foreign law the crimes charged, therefore, are extraditable offenses; they were properly set forth in the complaint; the commissioner duly acquired jurisdiction to issue a warrant and hear the case, and the District Court was right in refusing to liberate the prisoner.

In conclusion we beg to say that international treaties of this character have been invariably construed by this Honorable Court in a spirit of fairness toward the foreign government, and in extradition treaties in particular this court has always held that technicalities should be excluded as far as possible in order that full justice may be done.

In re Herres, 33 Fed., 165, Mr. Justice BREWER has said:

> "Finally I might observe, with reference to these extradition proceedings, that the substance, and not the form, should be the main object of inquiry, and that they should not be conducted in any technical spirit with a view to prevent extradition. While the courts should review the proceedings to see that no extradition is consummated upon a mere pretext, or to subserve private malice, yet if it appears that a crime has been committed, and probable that the accused has fled to this country for refuge, then a spirit of fairness, expecting that the foreign country will treat extradition proceedings from this country in the same spirit, requires that we act reasonably and justly, having reference more to the substance than to the form of the proceedings."

In view of the foregoing we respectfully submit that the order of the District Court discharging the writ of

habeas corpus should be affirmed, that the prisoner may be delivered up to the authorities of the demanding government under the warrant heretofore issued by the Department of State and now in the hands of the agents of the Kingdom of Prussia.

Respectfully submitted,

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WILLIAM MANNHARDT.
Attorneys for Appellee.

VOCKE & HEALY,
Of Counsel.

Supreme Court of the United States.

No. 475.—October Term, 1901.

Gerhard Terlinden, Appellant, *vs.* John C. Ames, United States Marshal for the Northern District of Illinois.	Appeal from the District Court of the United States for the Northern District of Illinois.

[February 24, 1902.]

August 15, A. D. 1901, Dr. Walther Wever, Imperial German Consul at Chicago, filed his complaint before Mark A. Foote, Esq., a commissioner of the United States in and for the Northern District of Illinois, and specially authorized to issue warrants for the apprehension of fugitives from justice of foreign governments, stating that he was "the duly accredited official agent and representative of the German Empire at Chicago and also the Kingdom of Prussia, forming a part of said German Empire," and charging that one Gerhard Terlinden, alias Theodor Graefe, a subject of the Kingdom of Prussia, did, within the first six months of the year 1901, "commit within the jurisdiction of the said Kingdom of Prussia various crimes of forgery and counterfeiting and the utterance of forged papers," in that as a director of the Gerhard Terlinden Stock Company, organized and doing business in said kingdom, said Terlinden forged and counterfeited certain certificates of the stock of said company amounting to about a million and a half of marks, and put out, uttered and disposed of the same to Robert Suermont of the city of Aachen, Prussia; the Amsterdamsche Bank, Netherlands; the Disconto Gesellschaft, a corporation doing business in Berlin, Prussia; and other persons and corporations, with felonious intent to cheat and defraud them respectively. The complaint further charged that Terlinden was at the time of committing said crimes a resident of the city of Duisburg and a citizen of said Kingdom of Prussia; that he was a fugitive from said kingdom; that on or about the first day of July, 1901, he fled into the jurisdiction of the United States of America for the purpose of seeking an asylum therein; that he was now said to be concealed within the Northern District of Illinois or in the Eastern District of Wisconsin; and that the crimes with which he was charged were crimes embraced within the treaty of extradition between the United States and the Kingdom of Prussia, concluded on the 16th day of June, 1852, and ratified May 30, 1853.

It was therefore prayed that a warrant be issued for the apprehension and commitment of Terlinden "in order that the evidence of his crimi-

nality may be inquired into, and the said Gerhard Terlinden, alias Theodor Graefe, may be extradited and delivered up to the justice of the said Kingdom of Prussia, in accordance with the stipulations of said treaty and the acts of Congress passed in pursuance thereof."

The complaint was duly verified and the commissioner issued his warrant, which was placed in the hands of John C. Ames, United States marshal in and for the Northern District of Illinois, and Terlinden was apprehended and held to be dealt with according to law.

Subsequently and on September 25, 1901, Dr. Wever, in his capacity aforesaid made another complaint before the commissioner, charging (1) the forging of a large number of stock certificates of the Gerhard Terlinden Stock Company; (2) uttering said stock certificates, well knowing them to be forged; (3) forging and counterfeiting the steel stamp of the Royal Prussian revenue office at Duisburg, Prussia; (4) imprinting said forged steel stamp upon the forged certificates of stock so as to make it appear that the tax required by the Prussian revenue law had been paid on said certificates issued by the company in said kingdom, and thus to give said forged certificates the appearance of genuineness; (5) uttering forged certificates of stock with said forged stamp thereon; (6) forging the acceptance of one Heinrich Schulte to a certain draft for nine thousand five hundred and eighty-two marks and thirty-five pfennings, and uttering the same; (7) forging the acceptance of one Wilhelm Seven to two certain drafts for the sums of twenty-six thousand two hundred and fifty marks and of twenty-five thousand nine hundred and twelve marks and forty-five pfennings, respectively, and uttering the same; or causing all these things to be done; "contrary to the laws of the Kingdom of Prussia."

It was stated that these several crimes were fully shown by the testimony of a number of witnesses heard before the examining judge of the Landgericht at Duisburg in the Kingdom of Prussia, "a court of competent jurisdiction in which the matter of the penal investigation instituted against the said Gerhard Terlinden, alias Theodor Graefe, is now pending, in order that he may answer for said several crimes;" and with the complaint were submitted copies of the depositions of the witnesses, together with a copy of the warrant of arrest issued by that court against Terlinden, "and of the provisions of the penal code of the German Empire applicable to said several crimes and providing punishment therefor," all of which were duly authenticated; and also a verified English translation thereof. This second complaint also showed that the crimes charged were committed within the jurisdiction of the Kingdom of Prussia; and that Terlinden was at the time of committing the same, a subject of that kingdom; and the commissioner in accordance with the prayer of the complaint issued another warrant, which was served on Terlinden the following day, he being discharged from arrest on the first warrant. On the 17th of October,

before any evidence was taken before the commissioner, Terlinden presented to the District Court of the United States for the Northern District of Illinois his petition praying for a writ of *habeas corpus* on the following grounds:

"1. No treaty or convention for the extradition of fugitives from justice exists between the United States and the German Empire.

"2. That the treaty or convention for the extradition of fugitives from justice concluded between the United States and the Kingdom of Prussia on the 16th day of June, 1852, and ratified May 30, A. D. 1853, was terminated by the creation of the German Empire and the adoption of the Constitution of said Empire in A. D. 1871, and that no treaty or convention for the extradition of fugitives from justice has been concluded between the United States, on the one part, and the Kingdom of Prussia or the German Empire, on the other, since said time.

"3. Said complaint does not charge an extraditable offense under the provisions of the treaty of 1852, concluded between the United States and Prussia and other German States, were said treaty still in force and of binding effect.

"4. Your petitioner is not guilty of any extraditable offense under the provisions of said treaty of 1852, were said treaty still in force and of binding effect.

"5. All proceedings had or attempted to be had before said commissioner under said complaint and warrant are illegal, void and without authority in law because said commissioner did not have jurisdiction over the person of this petitioner."

The writ of *habeas corpus* was issued and the marshal for the Northern District of Illinois filed his return October 21, setting forth that he "arrested said petitioner within said district on the 26th day of September, 1901, upon a warrant duly issued by Mark A. Foote, a United States commissioner specially appointed and authorized by the District Court of the United States for the Northern District of Illinois to hear applications for extradition and to issue warrants therefor, which said warrant was duly issued by said commissioner upon a complaint duly made by Walther Wever, Imperial German Consul at Chicago as representative of the Kingdom of Prussia, charging said Gerhard Terlinden, who, it appears, falsely assumed in this country the name of Theodore Graefe, with having, as a subject of the Kingdom of Prussia and within the jurisdiction of the said kingdom, committed the crimes of forgery, counterfeiting and the utterance of forged instruments, and with being a fugitive from justice of said Kingdom of Prussia. . . ."

The matter was brought on for hearing October 21, and after arguments of counsel the court gave leave to present briefs and adjourned the hearing to October 28. On that day the relator filed with the clerk of the court a traverse, reciting that with the complaint of September 26 there were filed "copies of the original testimony and translations of the same contained in the depositions taken before certain court officials in the Empire

of Germany, relative to the alleged offenses with which said complaint charges your petitioner; that said complaint refers to said depositions so filed in words following, to wit:" [Then setting forth the passages of the complaint to the effect that Dr. Wever therewith submitted "to the commissioner and files with this complaint a copy of all depositions of witnesses taken in said matter, together with a copy of the warrant of arrest issued by said court against the said Gerhard Terlinden, alias Theodor Graefe, and of the provisions of the penal code of the German Empire applicable to said several crimes and providing punishment therefor."]

The traverse then continued:

"That the provisions of the Criminal Code of the German Empire applicable to the facts and circumstances of this case as shown by the evidence hereto annexed are sections 240, 47, 49 first paragraph; section 360 fourth and fifth paragraphs; section 275 and section 56 of the Code of Criminal Procedure, also section 234 of the Civil Code, a correct translation of which sections are hereto annexed and marked Exhibit 'B' and made a part hereof.

"That said depositions so filed do not show or tend to show that your petitioner is guilty of any extraditable offense; that a copy of said deposition so referred to in said complaint and heretofore filed with said commissioner is hereto attached marked Exhibit 'A' and made a part of this traverse.

"Wherefore your petitioner prays that the return of the United States marshal herein be dismissed and your petitioner discharged."

Copies of depositions were attached to the alleged traverse; but no copy of the warrant of arrest issued by the court at Duisburg, or of the provisions of the penal code attached to the complaint.

An affidavit accompanied the traverse to the effect that affiant as an expert had made the annexed translations of certain sections and parts of sections of the German criminal and civil codes.

October 29, to which day the hearing of the cause had been continued, Terlinden presented a petition for a writ of certiorari to bring before the court "for its consideration the depositions, provisions of the German Criminal Code and copy of the original warrant issued by said German court heretofore referred to."

This application was denied by the District Court, October 31, and the court ordered "that the question of whether since the formation of the German Empire the extradition treaty concluded between the Government of the United States and the Kingdom of Prussia in 1852 is still in force or abrogated by the Constitution of the German Empire, be submitted to the court on briefs to be filed," and continued the hearing. It was also ordered "that said relator be remanded to the custody of the marshal, and that the motion to stay all further proceedings before the United States commissioner be and the same hereby is denied."

Thereafter, on November 5, the District Court entered an order finding that the petitioner was lawfully restrained of his liberty, directing the petition to be dismissed, and remanding petitioner, from which an appeal was taken to this court. Errors were assigned, in substance, that the court erred in declining to hold that no treaty exists between the United States and the Kingdom of Prussia or the German Empire; in assuming the existence of such treaty; in denying the right to introduce evidence for the purpose of showing that no extraditable offense had been committed; in denying the application for a certiorari; in holding that the record showed the commission of an extraditable offense.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The treaty of June 16, 1852, between the United States and the Kingdom of Prussia, and other States of the Germanic Confederation included in or which might accede to that convention, provided that the parties thereto should upon requisition "deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other." 10 Stat. 964, 966.

Pursuant to § 5270* of the Revised Statutes, (and the acts from which that section was brought forward,) complaint was duly made before a commissioner appointed and authorized by the District Court of the United States for the Northern District of Illinois to hear applications for extra-

*SEC. 5270. Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

dition and to issue warrants therefor, charging Terlinden with having as a subject of the Kingdom of Prussia, and within the jurisdiction of said Kingdom, committed the crimes of forgery, counterfeiting and the utterance of forged instruments, and with being a fugitive from the justice of said kingdom.

The complaint charged with much particularity, among other things, the forging and uttering of forged stock certificates of the Gerhard Terlinden Stock Company; the forging of the revenue stamp of the German Government employed by the Royal Prussian Revenue Office; and the forging and uttering of several enumerated acceptances.

Attached to the complaint and referred to therein were duly authenticated * copies of certain depositions taken before the examining judge of the court at Duisburg, Prussia, in which an investigation against Terlinden, that he might answer for said several crimes, was pending, together with a copy of the warrant for the arrest of Terlinden issued by that court, and of the provisions of the penal code of the German Empire applicable to the crimes in question and providing punishment therefor.

The commissioner issued his warrant and Terlinden was apprehended, whereupon and before the commissioner had entered upon the hearing, Terlinden petitioned and obtained from the District Court the writ of *habeas corpus* under consideration.

The settled rule is that the writ of *habeas corpus* cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*. *Ornelas* v. *Ruiz*, 161 U. S. 502, 508, and cases cited; *Bryant* v. *United States*, 167 U. S. 104.

*SEC. 5271. In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section.

The statute in respect of extradition gives no right of review to be exercised by any court or judicial officer, and what cannot be done directly cannot be done indirectly through the writ of *habeas corpus*. The court issuing the writ may, however, "inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion." Blatchford, J. *In re Stupp*, 12 Blatch. 501; *Ornelas* v. *Ruiz*, 161 U. S. 508.

By section 754 of the Revised Statutes it is provided that the complaint in *habeas corpus* shall set forth "the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known;" and by section 755 that the writ shall be awarded "unless it appears from the petition itself that the party is not entitled thereto."

On the face of the complaint extraditable offenses were charged to have been committed, and if petitioner desired to assert, as he now does in argument, that it appeared from the depositions taken before and the warrant of arrest issued by the court at Duisburg and the provisions of the criminal code that such was not the fact, they should have been set out. *Craemer* v. *Washington*, 168 U. S. 128.

And this clearly must be so where, as in this case, the writ is issued and petitioner undertakes to traverse the return. The return was that Terlinden was arrested and held by virtue of warrants of arrest and of commitment issued by the commissioner, under the extradition acts, against Terlinden as a fugitive from the justice of Prussia, and charged with the commission of crimes embraced by the treaty of extradition with that kingdom; and copies of the warrants were attached as part thereof. The alleged traverse referred to the complaint and annexed copies of the depositions filed with it, but did not annex a copy of the warrant of arrest issued by the court at Duisburg, or of the provisions of the penal code made part of the complaint; and also annexed certain sections and paragraphs of the Criminal Code of the German Empire, and of the Code of Criminal Procedure, and of the Civil Code, as applicable to "the facts and circumstances of the case," and then alleged that the depositions did not show or tend to show guilt of an extraditable offense.

This was manifestly insufficient. Petitioner could not select a portion of the documents accompanying the complaint and ask the court to sustain his conclusion of law thereon. Nor could he subsequently supply the inadequacy of the traverse by a certiorari, which could do no more, if it

could be, in any view, properly issued at that stage of the proceedings, than bring up what he should have furnished in the first instance.

Generally speaking, "whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purposes of the preliminary examination unless palpably erroneous in law." 161 U. S. 509.

Necessarily this is so, for where jurisdiction depends on the merits, the decision is not open to collateral attack involving a retrial, although if on the whole record the findings are contradicted, the inquiry as to lack of jurisdiction may be entertained.

In this case the writ of *habeas corpus* was issued before the examination by the commissioner had been entered upon, and his jurisdiction was the only question raised. If he had jurisdiction, the District Court could not interfere, and he had jurisdiction if there was a treaty and the commission of extraditable offenses was charged.

But it is said that the offenses complained of were not extraditable because their commission was averred to be "contrary to the laws of Prussia," whereas the criminal laws asserted to have been violated were those of the German Empire, and Prussia had no criminal laws dealing with such offenses. Hence it is argued that the commissioner had no jurisdiction, because if an extradition treaty existed it was with Prussia, and not with the German Empire; and if any crime was committed, it was against the German Empire and not Prussia.

It is true that by Article 2 of the Constitution of the German Empire it was provided that: "Within this territory the Empire shall have the right of legislation according to the provisions of this constitution, and the laws of the Empire shall take precedence of those of each individual state."

And by Article 4: "The following matters shall be under the supervision of the Empire and its legislation: . . . 13. General legislation regarding the law of obligations, criminal law, commercial law, and the law of exchange; likewise judicial proceedings."

Counsel for petitioner states in his brief that on January 1, 1872, the German Imperial Code went into effect, embracing provisions as to the crime of forgery "contained in sections 267, 268, 146 and 149, the very sections quoted in the depositions filed with the amended complaint." Counsel for respondent agrees with this except that he includes sections or paragraphs 147 and 270. All these are given below as furnished by

counsel for respondent.* And see Drage's Criminal Code of the German Empire, 227, 266. The traverse set up that there were filed with the complaint "a copy of all depositions taken in said matter, together with a copy of the warrant of arrest issued by said court against the said Gerhard Terlinden, alias Theodor Graefe, and of the provisions of the Penal Code of the German Empire applicable to said several crimes, and providing punishment therefor." The traverse did not set forth the warrant of arrest or the provisions of the code referred to, and merely attached certain other provisions which it was averred were applicable. The presumptions were against petitioner, apart from which, accepting the admissions of counsel, extraditable offenses were charged, if the laws quoted applied, as we think cannot be denied. We are unable to perceive that these laws were not the laws of Prussia, although prescribed by imperial authority, and the record discloses that they were being administered as such, in Prussia, by the Royal Prussian Circuit Court at Duisburg. The inquiry into the source of the laws of the demanding government is not material, and the objection is untenable.

It is obvious that the District Court could not remove the case from the commissioner by virtue of the writ of *habeas corpus*, and that the court rightly declined to hear evidence, to grant the certiorari, or to interfere with the progress of the case.

This brings us to the real question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was

*267. Whoever with unlawful intent forges or counterfeits a domestic or foreign public instrument or such a private instrument as may be of importance for the purpose of proving rights or legal relations, and makes use of the same for the purpose of deception, is punishable with imprisonment for forgery of instruments.

268. Forgery of an instrument made by any one with the intent of obtaining for himself or another a pecuniary gain, or to inflict injury upon another, is punishable as follows:

1. When the instrument is a private instrument, with imprisonment in the penitentiary up to five years, besides which a fine not exceeding three thousand marks may be imposed.

2. When the instrument is a public instrument, with imprisonment in the penitentiary for a term not exceeding ten years, besides which a fine of from one hundred and fifty to six thousand marks may be imposed.

In case of mitigating circumstances imprisonment in the common jail will take place, which, in the case of forgery of a private instrument, shall be not less than one week, and in case of forgery of a public instrument, not less than three months.

In addition to the imprisonment, a fine not exceeding three thousand marks may be imposed.

146. Whoever counterfeits inland or foreign coin or paper money for the purpose of using such counterfeited money as genuine or otherwise to put it in cir-

made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the extradition treaty of 1852. The contention is that, as the result of the formation of the German Empire, this treaty had been terminated by operation of law.

Treaties are of different kinds and terminable in different ways. The fifth article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

Undoubtedly treaties may be terminated by the absorption of Powers into other Nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.

This treaty was entered into by His Majesty the King of Prussia in his own name and in the names of eighteen other States of the Germanic Confederation, including the Kingdom of Saxony and the free city of Frankfort, and was acceded to by six other States, including the Kingdom of Wurtemburg, and the free Hanseatic city of Bremen, but not including the Hanseatic free cities of Hamburg and Lubeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic

culation; or who, with like intent, gives to genuine money, by alteration made upon the same, the appearance of higher value, or gives to invalidated money the appearance of money still current, shall be punished with imprisonment in the penitentiary for not less than two years. Police surveillance is also admissible. In the case of mitigating circumstances imprisonment in the common jail may be provided.

147. The same penalty extends to all persons who circulate the money counterfeited or altered by them with the above mentioned intent, and also to such persons who obtain counterfeited or altered money and either utter the same or bring the same from abroad with the intent of circulating the same.

149. Certificates of indebtedness made payable to the holder, bank notes, stock certificates or preliminary certificates or receipts taking their place, as well as coupons and dividends or renewal certificates thereto belonging, which may be issued by the Empire, the North German Confederation, a state of the Confederation, or a foreign state, or by any other community, corporation, company or private person authorized to issue such papers, are deemed equivalent to paper money.

270. It is treated as equivalent to forgery of an instrument in case anybody makes use of any forged or altered document, knowing the same to be forged or altered, with intent to deceive.

Confederation and the absorption of Hanover, Hesse Cassel, Nassau and the free city of Frankfort, by Prussia.

The North German Union was then created under the praesidium of the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially not only the Prussian Parliament, but also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount constitution of the North German United States, the King of Prussia, to whom he was accredited, was at the head of those several organizations or institutions; and his action was entirely approved by this government. Messages and Documents, Dep. of State, 1867–8, Part I, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

February 22, 1868, a treaty relative to naturalization was concluded between the United States and His Majesty, the King of Prussia, on behalf of the North German Confederation, the third article of which read as follows: "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other States of Germany on the other part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the States of the North German Confederation." 15 Stat. 615. This recognized the treaty as still in force, and brought the Republics of Lubeck and Hamburg within its scope. Treaties were also made in that year between the United States and the Kingdoms of Bavaria and Wurtemburg, concerning naturalization, which contained the provision that the previous conventions between them and the United States in respect of fugitives from justice should remain in force without change.

Then came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of his kingdom, and it perpetuated and confirmed that situation. The official promulgation of that Constitution recited that it was adopted instead of the Constitution of the North German Union, and its preamble declared that "His Majesty the King of Prussia, in the name of the North German Union, His Majesty the King of Bavaria, His Majesty the King of Würtemburg, His Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse, and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people." As we have heretofore seen, the laws of the Empire were to take precedence of those of the individual States, and it was vested with the power of general legislation in respect of crimes.

Article 11 read "The King of Prussia shall be the president of the Confederation, and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same; enter into alliances and other conventions with foreign countries, accredit ambassadors, and receive them. . . So far as treaties with foreign countries refer to matters which, according to Article IV, are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required for their ratification, and the approval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union," but this is not material, for admitting that the Constitution created a composite State instead of a system of confederated States, and even that it was called a confederated Empire rather to save the *amour propre* of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. During the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has thus been repeatedly recognized by both governments as in force. Moore's Report on Extradition with Returns of all Cases, 1890.

In 1889, in response to a request for information on international extradition as practiced by the German Government, the Imperial Foreign Office transmitted to our chargé at Berlin a memorial on the subject, in the note accompanying which it was said: "The questions referred to, in so far as they could not be uniformly answered for all the confederated German States, have been answered in that document as relating to the case of applications for extradition addressed to the Empire or Prussia." It was stated in the memorial, among other things:

"In so far as by laws and treaties of the Empire relating to the extradition of criminals, provisions which bind all the States of the union have

not been made, those States are not hindered from independently regulating extradition by agreements with foreign States, or by laws enacted for their own territory.

"Of conventions, some of an earlier, some of a later period, for the extradition of criminals, entered into by individual States of the union with various foreign States, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary, and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the States of the former North German Union, and also to Hesse, south of the Main, and to Wurtemburg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively." Moore's Report, 93, 94.

Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof. And see Laband, Das Staatsrecht des Deutschen Reiches, (1894), 122, 123, 124, 142.

It is out of the question that a citizen of one of the German states, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire as to its powers and the powers of its members, and especially as the Executive Department of our Government has accepted these conclusions and proceeded accordingly.

The same is true as respects many other treaties of serious moment, with Prussia, and with particular States of the Empire, and it would be singular, indeed, if after the lapse of years of performance of their stipulations, these treaties must be held to have terminated because of the inability to perform during all that time of one of the parties.

In the notes accompanying the State Department's compilation of Treaties and Conventions between the United States and other Powers, published in 1889, Mr. J. C. Bancroft Davis treats of the subject thus:

"The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the States composing the Empire. It cannot be said that any fixed rules have been established.

"Where a State has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

"Where no new treaty has been negotiated with the Empire, the treaties with the various States which have preserved a separate existence have been resorted to.

"The question of the existence of the extradition treaty with Bavaria was presented to the United States District Court, on the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas*

corpus, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

"Such a question is, after all, purely a political one."

The case there referred to is that of *In re Thomas*, 12 Blatch. 370, in which the continuance of the extradition treaty with Bavaria was called in question, and Mr. Justice Blatchford, then District Judge, said:

"It is further contended, on the part of Thomas, that the convention with Bavaria was abrogated by the absorption of Bavaria into the German Empire. An examination of the provisions of the Constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several States composing the confederation called the German Empire, and foreign countries, were annulled, or to be considered as abrogated.

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent's Com. 174. In the present case the mandate issued by the government of the United States shows that the convention in question is regarded as in force both by the United States and by the German Empire, represented by its envoys, and by Bavaria, represented by the same envoy. The application of the foreign government was made through the proper diplomatic representative of the German Empire and of Bavaria, and the complaint before the commissioner was made by the proper consular authority representing the German Empire and also representing Bavaria."

We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.

Treaties of extradition are executory in their character, and fall within the rule laid down by Chief Justice Marshall in *Foster* v. *Neilson*, 2 Pet. 314, thus: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department."

In *Doe* v. *Braden*, 16 How. 635, where it was contended that so much of the treaty of February 22, 1819, ceding Florida to the United States, as annulled a certain land grant, was void for want of power in the King of Spain to ratify such a provision, it was held that whether or not the King of Spain had power, according to the Constitution of Spain, to annul the

grant, was a political and not a judicial question, and was decided when the treaty was made and ratified.

Mr. Chief Justice Taney said: "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered."

Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender.

In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision. 1 Moore on Extradition, 21; *United States* v. *Rauscher*, 119 U. S. 407.

The power to surrender is clearly included within the treatymaking power and the corresponding power of appointing and receiving ambassadors and other public ministers. *Holmes* v. *Jennison*, 14 Pet. 569. Its exercise pertains to public policy and governmental administration, is devolved on the Executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs.

If it be assumed in the case before us, and the papers presented on the motion for a stay advise us that such is the fact, that the commissioner, on hearing, deemed the evidence sufficient to sustain the charges, and certified his findings and the testimony to the Secretary of State, and a warrant for the surrender of Terlinden on the proper requisition was duly issued, it cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded, had terminated by reason of the adoption of the constitution of the German Empire, notwithstanding the judgment of both governments to the contrary.

The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision, and it results that where proceedings for extra-

dition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of *habeas corpus.*

The District Court was right, and its final order is

Affirmed.

Mr. Justice HARLAN did not hear the argument and took no part in the decision of the case.

True copy.

Test:

Clerk Supreme Court, U. S.